SUPREME COURT OF THE UNITED STATES

NUMBER_____

OCTOBER TERM, 1983

AVERY C. (PETE) MOORE, PETITIONER

VERSUS

STATE OF LOUISIANA, RESPONDANT

83-5367

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF LOUISIANA, NUMBER 82-KA-1709

STEPHEN E. EVERETT
ATTORNEY FOR PETITIONER
P. O. BOX 1842
827 JOHNSTON STREET
ALEXANDRIA, LOUISIANA 71301
(318) 443-6312

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STATE OF LOUISIANA, RESPONDANT

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TO THE HONORABLE, JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

AVERY C. MOORE, a citizen of the United States, respectfully petitions this Court for a Writ of Certiorari to the Supreme Court of Louisiana, upon the following claims.

QUESTIONS PRESENTED FOR REVIEW:

A. Is petitioner's sentence of death for first degree murder in this case disproportionate within the meaning of the Eighth Amendment to the United States Constitution, and within this Court's decision in Enmund v. Florida, _____U.S._____, 102 S.Ct. 3368 (1982), and was he denied equal protection of the laws, under the Fourteenth Amendment to the Constitution of the United States, where there was no proof in the trial of the proceedings against him, that he either killed or attempted to kill, no proof of the commission of an armed robbery within the meaning of Louisiana law, only circumstantial proof of an intent to kill, and where a co-defendant on the same indictment was tried and convicted of second degree murder and sentenced to life imprisonment upon the same facts?

B. Are petitioner's rights to due process of law, confrontation of the witnesses against him, and to effective assistant of counsel, under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, contravened where a key prosecution witness in the proceedings against him, and who testified at trial, had been previously subjected to hypnosis in order to refresh and enhance his memory?

C. Does Louisiana's tandem application of divergent views concerning standards of review in circumstantial evidence cases, evidenced by the standards of Jackson v. Virginia, 443 U.S. 307, on the one hand, and those of La. R.S. 15:438, on the other hand, deny plaintiff's rights to due process of law and equal protection of the laws, under the Fifth and Fourteenth Amendments to the United States Constitution, where all of the evidence against petitioner relied upon by the State of Louisiana in order to convict him of first degree murder and sentence him to death, is circumstantial, and the State's own evidence shows a reasonable hypothesis of his innocence?

LIST OF ALL PARTIES TO PROCEEDING.

The only other parties to this proceeding are:

THE STATE OF LOUISIANA, whose interests were represented in the Court below by R. Greg Fowler, Assistant District Attorney in and for the Parish of Rapides, State of Louisiana.

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REFERENCE TO OFFICIAL REPORTS OF COURT BELOW.

The decision of the Court below, sought review in these proceedings, is reported at 432 So. 2d 209 (1983).

JURISDICTIONAL STATEMENT

1.

The opinion of the Supreme Court of Louisiana in this case, affirming petitioner's conviction and death sentence was rendered on April 4, 1983.

2.

Petitioner timely applied for a rehearing in the Louisiana Supreme Court, which rehearing was denied by that Court on June 24, 1983.

3.

A death warrant was issued on July 6, 1983, by the trial judge, in the form provided by Louisiana law, commanding that petitioner be executed in the manner provided by Louisiana law on September 20, 1983.

4.

Jurisdiction of this Court is believed to be conferred by the provisions of 28 U.S.C. 1257 (3), as amplified by Rule 17, (b) and (c), Rules of this Court.

CONSTITUTIONAL PROVISIONS, STATUTES, ETC., WHICH THE CASE INVOLVES:

A. Constitutional provisions:

1. Constitution of the United States--Fifth Amendment. See Appendix.

2. Constitution of the United States--Sixth Amendment. See Appendix.

3. Constitution of the United States--Eighth Amendment. "Excessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

4. Constitution of the United States--Fourteenth Amendment. See Appendix

B. Statutes:

1. La. R.S. 14:30. First Degree Murder--See Appendix.

2. La. R.S. 14:64. Armed Robbery--See Appendix.

3. La. R.S. 15:438. Circumstantial Evidence--"The rule as to circumstantial evidence is: 'assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence."

STATEMENT OF THE CASE

On January 17, 1981, Harold Austin, manager of a convenience store located in a rural area of Rapides Parish, Louisiana, was in the process of closing his store for the night at approximately 10:00 P.M. when he was abducted by individuals in a late model Buick automobile and taken from the convenience store. Approximately one hour later, the Sheriff's office in Rapides Parish, Louisiana, received an anonymous call from someone who had found a body in a ditch on a gravel road approximately three miles from the scene of Austin's abduction. Upon investigation, the body was identified as that of Austin. Austin had been killed almost instantly from a single bullet fired into his back, there being no evidence of any other injury. A revolver, owned by Austin, and some money were missing from Austin when the body was found.

At the time of the abduction, a Rapides Parish Sheriff's Deputy, Bruce Vanderhoeven, had been on routine patrol in the area of the convenience store. Vanderhoeven had stopped his patrol car in the parking lot of a restaurant across the street from the convenience store and observed a Buick automobile parked sideways in front of a door to the store. There were four persons in the car and a fifth person at the front of the store, apparently locking the door. Vanderhoeven observed the fifth individual enter the right rear door of the car, and as the car began to roll away, Vanderhoeven followed the car for approximately two miles, at night. Vanderhoeven had radioed a request for a license check on the vehicle, and the vehicle was shown to be registered to petitioner.

After a short investigation, petitioner and another individual, Vincent Orlando, were arrested in Houston, Texas, and a third individual, Tommy Wren, was arrested in Rapides Parish, Louisiana, for kidnapping, armed robbery, and first degree murder of Austin. Moore and Orlando were subsequently indicted in the same Bill of Indictment by a grand jury for these crimes, and Wren was indicted in a separate indictment.

Upon motion of the State, the indictment against Moore and Orlando was severed, and Moore was tried for first degree murder on March 8, 9, and 10, 1982, and was found guilty of first degree murder by a jury. At a bifurcated sentencing hearing on March 11, 1983, the same jury recommended that Moore be put to death.

A change of venue was granted to Orlando to a different parish in Louisiana, where, after a trial on the merits for first degree murder, upon the same indictment, and upon the same facts as heard by the Rapides Parish jury, on July 3, 1983, was convicted of second degree murder, and was sentenced to mandatory life imprisonment. Wren has not, as of the date of filing hereof, been tried.

During the course of pre-trial proceedings against petitioner, it was discovered by petitioner's attorney and by the attorneys for Orlando and Wren that Vanderhoeven, the only eyewitness to the offense, as part of the State's investigatory process, had been subjected to hypnosis, in order to enhance his memory of the events which he observed on the night of the abduction. Petitioner objected at trial and moved to exclude all of Vanderhoeven's testimony on the basis that the hypnotically enhanced testimony substantially eroded petitioner's rights to due process, to confrontation of the witnesses against him, and to effective counsel. The objection was overruled by the trial judge. Orlando's attorney, in the severed case, filed a Motion to Suppress Vanderhoeven's testimony, on the same grounds. This motion was heard, in an evidentiary hearing, subsequent to petitioner's trial, and was denied by the hearing judge. The Supreme Court of Louisiana granted Certiorari to review the correctness of that holding, and in an opinion handed down January 10, 1983, reported at 425 So. 2d 759, the ruling of the trial judge in that case was affirmed. Orlando was subsequently tried, and was found guilty of second degree murder, and sentenced to mandatory life imprisonment. Petitioner's objection was preserved for appeal on the merits, and this question was argued and submitted to the Louisiana Supreme Court on petitioner's appeal, and rejected, upon the basis of the ruling of that Court in the Orlando case.

Petitioner raised, briefed, and argued to the Louisiana Supreme Court eight specifications of error, all of which were considered by the Louisiana Supreme Court and rejected. In addition to the hypnosis issue mentioned above, there was no evidence introduced by the State at the trial that petitioner actually killed, or attempted to kill, the victim, Mr. Austin, and the only evidence respecting an intent to kill introduced by the State at trial were vague and general statements allegedly made by petitioner and Orlando two weeks to ten days

prior to the abduction to petitioner's niece, Margaret Weems, an admitted dealer in narcotics, that they intended to rob Austin, kill him, and leave his body in a roadside ditch. Weems testified at trial to this effect, and admitted her drug dealings under cross-examination, the introduction of the evidence being hearsay declarations of petitioner and Orlando, there being no formal confessions to law enforcement officers of any kind involved in this case, made either by petitioner, or by alleged co-conspirators.

At trial, the only evidence of the commission of an armed robbery introduced by the State (armed robbery being an essential element of the crime of first degree murder in Louisiana, as well as an aggravating circumstance for the imposition of the death penalty) was the fact that Austin's gun and money, which had been with him earlier in the day, were missing when his body was found. There is no direct evidence in the record as to who relieved him of these valuables, or when he was so relieved. In fact, the State's evidence showed that Austin's body lay beside a rural, but apparently well-traveled road, for some time after his death, and the body was in fact discovered by someone who telephoned law enforcement authorities and would not identify himself, thus creating an inference of a reasonable hypothesis of petitioner's innocence.

It was assigned as error, argued and briefed in the Louisiana Supreme Court that when viewed by applicable Eighth Amendment standards, and particularly in the light of this Court's decision in Enmund v. Florida, _____U.S._____, 102 S.Ct. 3368 (1982), because there is no proof that petitioner was the actual murderer or attempted murderer of Austin, and because the proof of intent to kill is not evident, and further, since there is no direct evidence of armed robbery, the imposition of the death penalty is disproportionate.

In its opinion, handed April 4, 1983, the Louisiana Supreme Court rejected all of the above arguments of petitioner, as well as all other arguments advanced by him for the reversal of his conviction and sentence, noting, especially, that Enmund v. Florida was distinguishable from petitioner's case because in the opinion of the Court, viewing the evidence against petitioner in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, and, since the defen-

dant presented no evidence from which any other reasonable hypothesis might be drawn, every reasonable hypothesis of innocence had been excluded.

Petitioner timely filed an application for rehearing calling the attention of the Supreme Court of Louisiana to its decision, also on April 4, 1983, in the matter of State of Louisiana v. Alfred B. Shapiro, No. 81-KA-1905, on its docket, which decision unanimously reversed a prior decision of the same Court in a second degree murder case. The Louisiana Supreme Court held in Shapiro that where an essential element of the crime is not proven by direct evidence, the provisions of Louisiana Revised Statutes, Title 15, Section 438, must apply, the provisions of that statute requiring a reviewer of fact to consider all the facts that the evidence variously tends to prove on both sides of the case, disregarding any choice by the fact finder favorable to the prosecution, the reviewer as a matter of law being able to affirm the conviction only if a reasonable hypothesis other than as presented by the State, is one favorably to the State, and there is absolutely no extant reasonable hypothesis of innocence. On June 24, 1983, the application for rehearing was denied by the Supreme Court of Louisiana, the Court, sub silento, rejecting this argument, as well as the collateral argument made by petitioner for the first time on application for rehearing, that the Court's opinion of April 4, 1983, deprived him of due process because it shifted the burden of proof in a criminal case to petitioner.

Petitioner annexes, in the appendix to this application, copies of all briefs filed in the Louisiana Supreme Court in support of his contentions herein, as well as a brief filed in support of his contentions on the hypnosis issue mentioned hereinabove, showing the stages of the proceedings at which the federal questions addressed in this petition were raised.

ARGUMENT

1.

HYPNOSIS

The decision of the Supreme Court of Louisiana in this case, as well as that in the companion case, Orlando and Wren, is contrary to the decisions of Courts of last resort in at least twelve other states. The other states are, with the appropiate case citations:

California: People v. Shirley, 641 P.2d 775 (1982).

Pennsylvania: Commonwealth v. Nazarovitch, 436 A.2d 170 (1981).

Maryland: Polk v. State, 427 A.2d 1041 (1981).

Arizona: State v. Mena, 624 P.2d 1274 (1981).

Michigan: People v. Tait, 297 N.W.2d 853 (1980), and People v. Hangsleben, 273 N.W.2d 539 (1978).

Virginia: Greenfield v. Commonwealth, 204 S.E.2d 414 (1974).

Georgia: Emmett v. State, 205 S.E.2d 631 (1974).

South Carolina: State v. Pierce, 207 S.E.2d 444 (1974).

Oregon: State v. Harris, 405 P.2d 492 (1965).

Illinois: People v. Harper, 250 N.E.2d 5 (1969).

Oklahoma: Jones v. State, 542 P.2d 1346 (1975).

Florida: Rodriguez v. State, 327 So.2d 903 (1976).

Only one other state besides Louisiana which has considered the question, New Jersey, has approved the forensic use of hypnosis, in recent years (State v. Hurd, 432 A.2d 86 (1981). Maryland, in Polk v. State, Supra, overruled a prior holding by the Maryland Supreme Court, Harding v. State, 246 A.2d 302 (1968), which had previously approved the forensic use of hypnosis in that state.

The above mentioned decisions of the above mentioned Courts of last resort all hold, in varying fact situations, that the forensic use of hypnosis in criminal trials is per ser impermissible, as a denial of due process, since the forensic use of hypnosis has not gained acceptance as a scientific field of endeavor. See Frye v. United States, 293 F. 1013 (D.C. Circuit, 1923).

This Court has never considered the Constitutional implications of the forensic use of hypnotically enhanced testimony, and it is not believed that this Court has had a proper opportunity, until now, to consider this issue.

Bruce Vanderhoeven, the Deputy Sheriff who observed the abduction, and the subject of the hypnotic enhancement, is the only eyewitness to any portion of the events commencing with the abduction of Mr. Austin, the victim, on the night of January 17, 1981. Vanderhoeven observed certain individuals in a yellow Buick automobile, under extremely dim lighting conditions, at the scene of the abduction of the victim at the convenience store. He followed the vehicle in his police unit, and was able to radio the license number of the vehicle to other authorities, for a license check. He abandoned following the vehicle when he found that the vehicle was properly registered. He abandoned the vehicle several miles from where the victim's body was found, and there are no eyewitnesses to anything which transpired after Vanderhoeven abandoned his "tail" of the Buick automobile. The purpose of the hypnotic session was to enhance Vanderhoeven's memory concerning what he was, and his descriptions of the persons in the vehicle. At trial, he identified petitioner as the driver of the Buick automobile. His identification in Court was extremely firm and positive, and attempts to cross-examine him proved fruitless because his confidence and firmness grew the more he was questioned and pressed about the matter.

As will be seen from a copy of a brief filed on behalf of the co-defendant, Vincent Orlando, and Tommy Wren, in the Louisiana Supreme Court, when the Court considered the question initially, there is a considerable body of expert testimony which expresses the opinion that hypnotic sessions such as the one undergone by Vanderhoeven distort memory, and implant the hypnotic examiner's opinions and suggestions in the mind of the subject of the hypnotic session. The expert opinion relied upon is to the effect that, not only does the hypnotic session or sessions cause the witness to confabulate, but render the witness absolutely unshakeable on matters about which he does not confabulate.

Such hypnotic enhancement of the testimony of prosecution witnesses denies petitioner due process, as well as a fair confrontation by the witnesses against him, and also hampers, considerably, his right to the effective assistance of counsel. In addition, because the great body of authority, on a national basis, favors the per se rejection of such testimony, the acceptance of the same in this case denies petitioner equal protection of the laws.

DISPROPORTIONALITY--

CRUEL AND UNUSUAL PUNISHMENT

The decision of the Louisiana Supreme Court in this case is directly contrary to the decision of this Court in Enmund v. Florida, _____U.S._____, 102 S.Ct. 3368 (1982). Petitioner herein is not a proved trigger man. As in Enmund, there is no proof, whatsoever, that petitioner killed, or attempted to kill. The proof of intent to kill in petitioner's case is no different, as a practical matter, from the apparent proof adduced in Enmund.

Margaret Weems, a niece of petitioner, testified that petitioner and Vincent Orlando, indicted with him, tried separately, and found guilty of second degree murder, made statements at her home two weeks to ten days prior to January 17, 1981, that they were going to rob Austin, kill him, and throw his body in a roadside ditch. There is no evidence of an elaborate plot, scheme, or plan, only evidence of these statements made by petitioner and Orlando, at a period of time well in advance of the event itself. In Enmund, the prosecutor argued to the jury that Enmund had initiated and planned the armed robbery in question, and there was testimony at trial that the day of the robbery, Enmund announced that he had decided to rob the victim in that case after he had seen the victim's money a few weeks earlier. Like Enmund, petitioner here argued in the Louisiana Supreme Court that he should be found guilty at most of second degree murder under the applicable Louisiana statute.

It should especially be noted that here, in contrast to Enmund, there is no direct evidence that petitioner, or anyone with petitioner in fact murdered Austin. Likewise, there is no direct evidence that petitioner, or anyone with whom he was associated, committed an armed robbery of Austin. In fact, with regard to robbery, the State's evidence is such that it is just as reasonable to assume that someone found Austin's body on the side of the road, relieved the body of its valuables, and reported the discovery of the body, anonymously, to the law enforcement authorities.

When judged by the Enmund standard, the imposition of the death penalty upon petitioner herein is totally inconsistent with the letter, spirit, and intent of the Eighth and Fourteenth Amendments, as such disproportionate, and should be reversed.

CIRCUMSTANTIAL EVIDENCE--

EQUAL PROTECTION

On April 4, 1983, the same date that petitioner's decision was rendered by the Louisiana Supreme Court, the same Court rendered its decision in No. 81-KA-1905, State of Louisiana v. Alfred B. Shapiro, an unrelated prosecution for second degree murder. The two opinions are totally inconsistent as to the standard of review of evidence in circumstantial evidence cases in Louisiana, and petitioner asserts that this divergence denies him equal protection of the laws, a substantial federal question.

In its previous term, this Court dismissed an appeal from Louisiana in a circumstantial evidence case, Graham v. Louisiana, for want of a substantial federal question. See No. 82-1307, Graham v. Louisiana, ruling below, 422 So.2d 123. At the time Graham was filed in this Court, however, the Louisiana Supreme Court had not rendered decisions in petitioner's case and Shapiro's case. Further, petitioner's case is distinguishable from Graham because in Graham, defendant's proposed hypothesis of innocence was unreasonable. Here, the hypothesis of innocence is reasonable, and is in fact suggested by the State's own evidence.

This Court has previously held in Jackson v. Virginia, 443 U.S. 307 (1979), that the Fourteenth Amendment's due process gaurantee required that a State criminal conviction be based on proof sufficient for any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, to find the essential elements of the crime charged beyond a reasonable doubt. Reasonable doubt may be overcome by circumstantial evidence, thus fulfilling the requirements of Constitutional due process. However, federal due process standards do not require that circumstantial evidence exclude every hypothesis other than guilt. In Louisiana, however, circumstantial evidence is held to a higher standard. Louisiana R.S. 15:438 provides: "The Rule as to circumstantial evidence is: assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence."

Under Louisiana's law as interpreted by the Shapiro Court, there is a possibility that the quality of evidence supporting a conviction might satisfy the requirements of Jackson v. Virginia, but would not satisfy the requirements of La. R.S. 15:438. The Louisiana Supreme Court in Shapiro, held that in all cases where an essential element of the crime is not proven by direct evidence, the rule of R.S. 15:438 applies. A copy of the Shapiro opinion is included within the appendix to this petition.

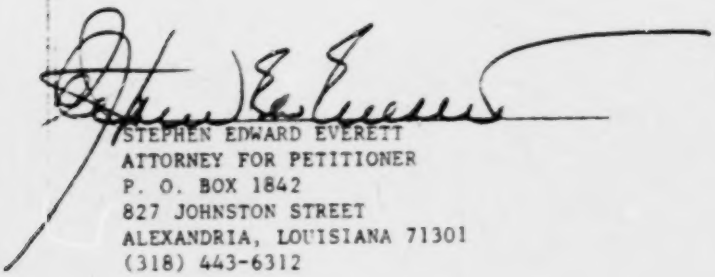
The Louisiana Supreme Court in petitioner's case, however, did not mention R.S. 15:438. It specifically held that all of the evidence against petitioner was in fact circumstantial, but then proceeded to apply the Jackson v. Virginia standard, in a case where the standard should not have been applied in Louisiana. This arbitrary application of double standards, in petitioner's case, is an absolute violation of the Fourteenth Amendment, working a denial to petitioner of equal protection of the laws.

C O N C L U S I O N

PETITIONER PRAYS that this Court issue a Writ of Certiorari, to the Supreme Court of Louisiana, ordering it to transmit forthwith to this Honorable Court the record in his proceedings, so that the validity of such proceedings may be ascertained;

PRAYS FURTHER for all needful stays in these premises, and for full and general relief.

BY HIS ATTORNEYS:



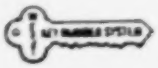
STEPHEN EDWARD EVERETT
ATTORNEY FOR PETITIONER
P. O. BOX 1842
827 JOHNSTON STREET
ALEXANDRIA, LOUISIANA 71301
(318) 443-6312

not mean he is guilty of that crime." The trial judge declined, responding, "that's in my charge to the jury." Accordingly, the trial court merely refused a request to vary the order of trial by instructing the jury on the presumption of evidence before evidence was taken. Defendant does not contend that the trial court failed to deliver this instruction in his general charge to the jury at the end of the trial. Although an early instruction on the subject may have been helpful to the jury under the circumstances, we conclude that it was not reversible error to delay giving it until the general charge. The order and timing of jury instructions are generally within the discretion of the trial court. We find that no misuse of discretion or prejudice to the accused resulted from the trial court's decision.

Therefore, this assignment of error lacks merit.

The defendant's convictions and sentences are affirmed.

AFFIRMED.



STATE of Louisiana

v.

Avery C. "Pete" MOORE.

No. 82-KA-1709.

Supreme Court of Louisiana.

April 4, 1983.

Rehearing Denied June 24, 1983.

Defendant was convicted in the Ninth Judicial District Court, Parish of Rapides, Jules Davidson, Jr., J., of first-degree murder and was sentenced to death, and he appealed. The Supreme Court, Blanche, J., held that: (1) exclusion of certain jurors who voiced an opposition to the death penalty did not deprive defendant of a fair and impartial jury; (2) eyewitness testimony of a deputy sheriff was properly admitted; (3) the evidence was sufficient to sustain the conviction; (4) statements by prosecutor in his closing argument did not inject into the penalty proceeding passion, prejudice or any other arbitrary factor which contributed to the recommendation of the death penalty; (5) the evidence was sufficient to sustain the finding as to the statutory aggravating circumstance of an armed robbery; and (6) the death penalty was not disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Affirmed.

Marcus, J., concurred and assigned reasons.

1. Criminal Law ⇐1166.17, 1177

Error on the part of trial court consisting of improperly excusing all veniremen who voiced an opposition to the death penalty cannot serve as a ground upon which to assail a conviction; such error may only be asserted to attack the death sentence.

2. Jury ⇐108

Prospective jurors may be excused for cause if they indicate that they would not impose the death penalty under any circumstances. LSA-C.Cr.P. art. 798.

3. Jury ⇐108

In prosecution for first-degree murder, seven jurors excused by court, and one excused on state challenge for cause were properly excused where each had stated unequivocally that he or she could not vote for the death penalty under any circumstances. LSA-C.Cr.P. art. 798(2).

4. Jury ⇐33(2.1)

In prosecution for first-degree murder, State's exercise of peremptory challenge against juror who expressed general opposition to death penalty but stated that she would not automatically vote against it did not render the jury "death qualified" or otherwise unconstitutionally tainted. LSA-C.Cr.P. art. 798.

5. Witnesses ⇐257.10

In first-degree murder prosecution, testimony of deputy sheriff was properly admitted even though he had undergone hypnosis where sheriff's original eyewitness identification of defendant had been certain and was not enhanced in any way by the hypnosis, since the hypnosis was a factual issue going to weight to be accorded witness's testimony rather than to its admissibility.

6. Criminal Law ⇐339.10(8)

In prosecution for first-degree murder, trial court properly allowed deputy sheriff to identify defendant in-court, even though trial court had suppressed a pretrial photographic lineup, since evidence was sufficient to establish that witness' in-court identification had basis independent of the pretrial photographic lineup.

7. Criminal Law ⇐651(1), 1152(1)

Decision whether to grant motion to have jury view scene of crime is within sound discretion of trial court, and ruling will not be disturbed on appeal absent abuse of discretion. LSA-C.Cr.P. art. 762(2).

8. Criminal Law ⇐651(1)

In prosecution for first-degree murder, trial court did not abuse its discretion in denying defendant's motion to allow jury to view the crime scene.

9. Criminal Law ⇐1159.2(7)

Proper standard of appellate review for sufficiency of evidence claim is whether, after reviewing evidence in light most favorable to prosecution, any rational trier of fact could have found essential elements of crime beyond a reasonable doubt.

10. Homicide ⇐253(6)

Evidence was sufficient to sustain finding that defendant shot the victim with specific intent to kill while engaged in perpetration of an armed robbery, and thus evidence was sufficient to sustain conviction of first-degree murder. LSA-R.S. 15:438.

11. Criminal Law ⇐1171.1(2)

General rule with regard to improper argument is whether jury was influenced by the remarks and whether the remarks contributed to the verdict. LSA-C.Cr.P. art. 774.

12. Criminal Law ⇐723(1)

In first-degree murder prosecution in which death penalty was sought, prosecutor's comment during closing argument of penalty phase that "justice has been waiting for years for this penalty" was within permissible scope of closing argument, and did not serve to incite passions of jury, prejudice defendant, or constitute an arbitrary factor which weighed unduly in jury's deliberations, since reasonable interpretation of the comment was that state had been waiting for years for death penalty to be imposed in that case. Sup.Ct.Rules, Rule 28, § 1(a), 8 LSA-R.S.; LSA-C.Cr.P. art. 774.

13. Criminal Law ⇐720(6)

While prosecutor must base his conclusions and deductions upon the evidence adduced at trial to stay within parameters of Code of Criminal Procedure, both State and defense are entitled to their own conclusions as to what is established by the evidence and to press upon jury any view arising out of the evidence. LSA-C.Cr.P. art. 774.

14. Criminal Law ⇐723(1)

In first-degree murder prosecution in which death penalty was sought, statements of prosecutor in closing argument which asked jurors to place themselves in shoes of the victim, and which described victim's death did not inject into penalty proceeding any undue passion, prejudice or other arbitrary factor which unfairly influenced jury's recommendation that defendant be sentenced to death. Sup.Ct.Rules, Rule 28, § 1(a), 8 LSA-R.S.; LSA-C.Cr.P. art. 774.

15. Homicide ⇐354

In first-degree murder prosecution, death sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor which might have required

that the sentence be set aside. Sup.Ct. Rules, Rule 28, § 1(a), 8 LSA-R.S.

16. Homicide ⇐354

In first-degree murder prosecution in which death penalty was sought, evidence was insufficient to sustain finding of statutory aggravating circumstances that defendant was engaged in perpetration of an aggravated kidnapping at the time he killed victim and that offense was committed in an especially cruel manner; however, evidence was sufficient to sustain the statutory aggravating circumstance that defendant was engaged in perpetration of an armed robbery at time of the killing. LSA-C.Cr.P. arts. 905.3, 905.4(a, g).

17. Criminal Law ⇐1206(2)

In first-degree murder prosecution, death penalty imposed was not disproportionate to penalty imposed in similar cases, considering both the crime and defendant. Sup.Ct.Rules, Rule 28, § 1(c), 8 LSA-R.S.

William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Asst. Atty. Gen., Edwin O. Ware, Dist. Atty., R. Greg Fowler, Asst. Dist. Atty., for plaintiff-appellee.

Stephen E. Everett, Alexandria, for defendant-appellant.

BLANCHE, Justice.

Defendant Avery C. "Pete" Moore was convicted of first degree murder for the shooting death of Harold Austin, a violation of LSA-R.S. 14:30. Following the sentencing hearing, the jury of twelve recommended unanimously that the defendant be put to death, and the trial court sentenced him accordingly. In reaching its conclusion, the jury found the existence of the following aggravating circumstances: (1) the defendant had been engaged in the perpetration of an armed robbery and an aggravated kidnapping at the time he killed the victim, and (2) the offense had been committed in an especially cruel manner. La.C.Cr.P. art. 905.4, ¶¶ (a), (g). In appealing his conviction and sentence, the defendant argues eight of the twenty-six errors assigned with the trial court.[1]

FACTS[2]

Shortly after closing his store at 10:00 p.m. on January 17, 1981, Harold Austin, manager of a Shop-Mor convenience store in Tioga, Louisiana, was abducted at gunpoint. About thirty to forty-five minutes later, his body was discovered alongside a rural road in Ball, Louisiana, a small community a few miles from Tioga. He had been robbed of his valuables and shot once in the chest.

At the time of the abduction, Rapides Parish Sheriff's Deputy Bruce Vanderhoeven had been on routine patrol in the Tioga area. Vanderhoeven stopped his patrol car in the parking lot of a "Cotton Patch" family restaurant across the street from the Shop-Mor and observed a gold-colored Buick parked sideways in front of the door. There were four persons in the car and a fifth person at the front of the store, apparently locking the door. The man then hurried to enter the right rear door of the car as it began to slowly roll away. Vanderhoeven believed the man to be Michael Ebey.

1. Generally, assignments neither briefed nor argued are considered as abandoned. However, in cases where the death penalty has been imposed, we review such assignments as a matter of policy. *State v. Brogdon*, 426 So.2d 158 (La.1983); *State v. Lindsey*, 404 So.2d 466 (La.1981); *State v. Monroe*, 397 So.2d 1258 (La.1981). Our careful review of the record has revealed that none of these assignments represents reversible error. Consequently, they will be treated in an appendix to this opinion which will remain unpublished, yet nevertheless form part of the official record of this case.

2. See *State v. Wren*, 425 So.2d 756 (La.1983) for a more detailed analysis of the testimony of Deputy Vanderhoeven. In *Wren*, we affirmed a ruling of the trial court overruling the motions of Tommy Wren and Vincent Orlando, two defendants also charged with the murder of Harold Austin, which had sought to suppress the testimony of Vanderhoeven because he had undergone hypnosis in the hopes of refreshing his memory as to the night of the incident. See also Argument No. II, *infra*.

The car drove away slowly and Vanderhoeven followed, radioing a request that another unit check the store. A license check showed the vehicle to be registered to Avery Moore of Tioga. Vanderhoeven followed the vehicle for approximately two miles and was able to render descriptions of four of the five occupants. The fifth passenger sat in the middle of the rear seat, slumped low as though he were being pushed down. Vanderhoeven got a particularly good look at the driver and described him as an elderly white man with a receding hairline and glasses.

The other patrol car reported the store to be locked for the evening and Vanderhoeven broke off his surveillance. Still troubled by the incident, Vanderhoeven returned to the Shop-Mor and found Austin's car parked at the far end of the lot with the driver's door open. Austin's body was discovered a short time later. It was ultimately determined that he had died almost instantly from a single gunshot wound caused by a bullet of approximately .38 caliber. The bullet had passed through his body and was never recovered.

At about 2:15 a.m., Vanderhoeven was called to the Tioga substation to aid in the investigation and gave to the investigating officers the above statement facts. Further investigation revealed that the man whom Vanderhoeven had seen run from the door to the car was not Michael Ebey; rather, he was determined to have been a man named Vincent Orlando, who ultimately proved to be the roommate of Avery Moore, the owner of the car. The two resided in Houston, Texas. It was further revealed that Tommy Wren, the roommate of Michael Ebey, was also in the car at the time of the abduction. The fourth person, believed to be a woman, was never positively identified. At about 6:00 a.m. the following morning, Vanderhoeven was shown pictures of Vincent Orlando, whom he identified positively as the man he had seen hurrying from the door to the car, and Avery Moore, whom he identified positively as the driver.

On January 29, 1981, Vanderhoeven gave another statement which was largely repetitive of the first. He also identified photographs of the car belonging to Avery Moore. Further, he selected photographs of the occupants of the car out of photographic lineups. Much later, on March 6, 1982, Vanderhoeven was hypnotized by a state trooper in an attempt to refresh his memory so that he might be able to more particularly identify the woman passenger. However, the hypnosis produced no facts which were not already known to the investigating officers.

On January 19, 1981, the defendant and Orlando were arrested at their residence in Houston. Three .380 caliber cartridges were seized from inside the residence and a box of .380 cartridges was seized from the trunk of a vehicle located at the residence.[3] The defendant's gold-colored Buick was discovered abandoned in a Houston parking lot. The murder weapon was never recovered.

ARGUMENT NO. 1

(Assignments of Error Nos. 1, 5, 6)

By these assignments, the defendant argues that he was denied his right to a fair and impartial trial because all jurors who had voiced an opposition to the death penalty, however slight, were automatically excused by the trial court without extensive voir dire to determine whether they were nevertheless qualified to serve. The principal thrust of his argument, as stated in brief, seeks reversal of his conviction.[4]

3. Apparently, this vehicle belonged to Linda Reed, a friend of the defendant. The box of ammunition was found in a suitcase which belonged to Avery Moore.

4. The defendant does urge this in his sentence review memorandum as a ground for reversal of the death sentence, and we will necessarily examine this contention in accordance with Supreme Court Rule 28, § 1(a) in determining whether the death sentence was imposed under the influence of "passion, prejudice or other arbitrary factors." A "death qualified" jury cannot constitutionally impose or recommend a death sentence. *cf.* Witherspoon v. Illinois, 391

[1] There is no merit to the defendant's contention that the exclusion of these prospective jurors deprived him of a fair and impartial jury which ultimately resulted in his conviction. Even if we were of the opinion that these veniremen had been improperly excused, such error on the part of the trial court cannot serve as a ground upon which to assail a conviction. Such error may only be asserted to attack the death sentence. *Witherspoon v. Illinois*, 391 U.S. 510, 522–523, n. 21, 88 S.Ct. 1770, 1776–77, n. 21, 20 L.Ed.2d 776 (1968); *State v. Perry*, 420 So.2d 139, 143 (La.1982).

In *Witherspoon*, the United States Supreme Court held that a death sentence could not be constitutionally imposed or recommended by a jury which had been chosen by excluding prospective jurors simply because they had expressed general objections to the death penalty or merely because they had conscientious or religious scruples against its infliction. However, the Court stated expressly that the decision was not meant to foreclose the exclusion of jurors who made it "unmistakably clear" that they would *automatically* vote against the death penalty under any circumstances. 391 U.S. at 522, 88 S.Ct. at 1777; *cf. State v. Perry*, *supra*.

La.C.Cr.P. art. 798 provides:

"It is good cause for challenge on the part of the state, but not on the part of the defendant, that:

* * * * * *

(2) The juror tendered in a capital case who has conscientious scruples against the infliction of capital punishment and makes it unmistakably clear (a) that he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him, or (b) that his attitude toward the death penalty would prevent him from making an impartial decision as to the defendant's guilt; . . . ."

U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); see penalty phase review, *infra*.

[2] This provision was amended in order to conform with *Witherspoon*.[8] Subsequent jurisprudence has upheld the validity of art. 798, and it is well-settled that prospective jurors may be excused for cause if they indicate that they would not impose the death penalty under any circumstances. *State v. Jordan*, 420 So.2d 420 (La.1982); *State v. Perry*, *supra*; *State v. Lindsey*, 404 So.2d 466 (La.1981); *State v. Francis*, 403 So.2d 680 (La.1981); *State v. Monroe*, 397 So.2d 1258 (La.1981); *State v. George*, 371 So.2d 762 (La.1979), cert. denied, 444 U.S. 963, 100 S.Ct. 430, 62 L.Ed.2d 328.

[3] In this case, nine prospective jurors voiced an opposition to the death penalty. Of these nine, seven were excused by the court, one was excused on a state challenge for cause, and one was challenged peremptorily by the state. Our review of the voir dire examination shows that the seven veniremen excused by the court and the one venireman excused on a state challenge for cause had each stated unequivocally that he or she could not vote for the death penalty under any circumstances. Therefore, these jurors were properly excused. La.C.Cr.P. art. 798(2); *Witherspoon v. Illinois*, *supra*.

[4] Only one prospective juror expressed a general opposition to the death penalty but stated that she would not automatically vote against it. The state challenged her peremptorily. Other than this isolated instance, the defendant has made no showing that the state used its peremptory challenges to systematically exclude veniremen who expressed a general opposition to the death penalty; in fact, the state did not use all of its twelve peremptory challenges. In our opinion, the state's exercise of a peremptory challenge against this one prospective juror did not render the jury "death qualified" or otherwise unconstitutionally tainted within the meaning of *Witherspoon*.

These assignments are without merit.

8. Acts 1968, Ex.Sess., No. 13, § 1, emerg. eff. Dec. 27, 1968, at 1:00 p.m.

ARGUMENT NO. II

(Assignments of Error Nos. 9, 24)

[5] By these assignments, the defendant argues that the trial court erred in admitting the testimony of Deputy Bruce Vanderhoeven. Adopting the arguments of Tommy Wren and Vincent Orlando in *State v. Wren*, 425 So.2d 756 (La.1983), the defendant asserts that Vanderhoeven's recollection had become so tainted by the hypnosis that his testimony had ceased to be reliable and therefore should have been ruled inadmissible. In overruling the defendant's objection to the testimony, the trial judge ruled that the hypnosis was a factual issue going to the weight to be accorded his testimony rather than to its admissibility. For the reasons assigned in *State v. Wren*, *supra*, we agree with that assessment.[6]

Immediately following the incident, Vanderhoeven gave a written statement describing the events which he had observed, including descriptions of the defendant and the other occupants of the car. The statement was admitted into evidence at trial. The morning following the incident, Vanderhoeven positively identified the defendant from a photograph as the driver of the vehicle.

Eleven days following the incident, Vanderhoeven gave another statement which was largely repetitive of the first. This statement was also admitted into evidence at trial. At the time of this second statement, Vanderhoeven identified photographs of the defendant's car. Six weeks later, he was hypnotized in the hope that his memory would be "refreshed" so that he might be able to more particularly describe the woman passenger, but the hypnosis yielded no new information.

At trial, Vanderhoeven testified extensively concerning his observations on the night of the incident. He made in-court identifications of the defendant and photographs of the defendant's vehicle based on those eyewitness observations. He was subjected to vigorous cross-examination as to any effect which the hypnosis may have had on his ability to identify the defendant but remained certain that it was the defendant whom he had seen driving the vehicle that night.

In *State v. Wren*, *supra*, we decided this precise issue:

* * * * * *

"We are of the opinion that Vanderhoeven has not been rendered by the hypnosis as incompetent to testify as to his observations on the night of the incident. Since Vanderhoeven's original identification of the defendants had been certain and was not enhanced in any way by the hypnosis, we find it unnecessary to assess squarely the admissibility of hypnotically-*induced* testimony in criminal cases, i.e., where facts are elicited under hypnosis which were otherwise unknown or not previously revealed by the witness prior to the hypnosis. Here, the hypnosis produced no facts which were not already known to the investigating officers.

* * * * * *

[T]he issue of Vanderhoeven's hypnosis should go to the question of the proper weight to be accorded his testimony rather than to the question of its admissibility. We agree with the assertion that skillful cross-examination will enable the trier of fact to evaluate the effect of the hypnosis on Vanderhoeven's credibility. Additionally, since Vanderhoeven's first two statements provide an independent basis for corroboration of his hypnotic and post-hypnotic statements and identifications, any of the feared risks of "confabulation" and undue suggestion become insignificant. The defendant may always counter the proffered evidence with ex-

6. In oral argument before this court, defense counsel was questioned expressly from the bench as to whether there were any facts present in this case which might distinguish it from *Wren*. Specifically, counsel was asked whether during trial Vanderhoeven had testified as to any facts which had been hypnotically-induced, i.e., had the hypnosis caused him to testify at trial as to any facts which were unknown before he had been hypnotized. Counsel replied with an unequivocal, "No."

pert testimony highlighting any questions as to the reliability of Vanderhoeven's testimony due to the hypnosis, thereby casting doubt on his credibility." 425 So.2d at 758–759.

In light of the above ruling, these assignments are without merit.

ARGUMENT NO. III

(Assignment of Error No. 9)

[6] By this assignment, the defendant argues that the trial court erred in allowing Deputy Vanderhoeven to identify him in-court. More specifically, he contends that the trial court granted his pre-trial motion to suppress a pre-trial photographic lineup and that the same basis which had justified suppression of that particular out-of-court identification justified suppression of the in-court identification as well. The defendant asserts that Vanderhoeven testified at trial to no circumstances different from those submitted at the hearing on the motion to suppress, therefore there was not presented at trial a foundation sufficient to support the in-court identification.

We disagree. The trial judge cited these reasons for granting the motion to suppress:

* * * * * *

"I have the testimony and reviewed the transcript presented to me.

The testimony of Bruce Vanderhoeven was basically that he observed a car parked in front of the Shop-Mor. His attention was mainly focused upon the person locking or leaving the door and coming, which happens to be Vincent Orlando as it turned out in his testimony. He did state, on page 52, that he looked at all of the occupants. He gave no description in his testimony of the party who was the driver of the car in that [which] is presented to me.

* * * * * *

He did give some description of him. We have Moore(1) which is a photographic lineup of fourteen people. He is the only one with glasses therein in the age category that he has."

* * * * * *

The "testimony" to which the trial judge referred was the transcript of Vanderhoeven's statement following the incident. At the hearing on the motion to suppress, both the state and the defendant submitted the issue solely on the basis of that transcript. Vanderhoeven gave no live testimony. However, at trial, he testified extensively as to his observations of the defendant as the driver of the vehicle, and the foundation for his in-court identification was far more substantial than the truncated version upon which was decided the motion to suppress.

At trial, Vanderhoeven testified that the Shop-Mor parking lot where he first observed the defendant's vehicle was well-lighted with fluorescent lamps and that all of his attention was focused on the occupants of the car. When the car pulled away from the door, it passed directly in front of him for a short distance with the driver's side toward him before turning away slowly. He followed the car closely, within one or two car lengths, for approximately two miles. The vehicle stopped at no fewer than three well-lighted intersections, and his headlights were on "bright" and flooded the interior of the vehicle. Still further, Vanderhoeven testified:

* * * * * *

Q: "[D]o you have any difficulty in recognizing the person who was driving the car?

A: No, sir. I don't.

* * * * * *

Q: Describe the person that you saw driving that vehicle.

A: The individual looked to me like he was about fifty(50) to fifty-five(55) years old. He wore glasses and the position where I was at behind the car, I could see probably three-quarters of his face. The area was well illuminated. I got a real good look at the individual that was driving the car.

Q: [D]o you see the person today?

A: Yes, sir.

Q: [W]ould you point him out to the jury?

A: The defendant sitting right over here.

• • • • • •

Q: Any doubt in your mind as to who you have identified?

A: No, sir."

• • • • • •

There is ample evidence in the record to establish that Vanderhoeven's in-court identification had a basis independent of the pre-trial photographic lineup, even if that lineup were to be considered suggestive. His in-court identification was based solely on his observations the night of the incident. The strength of the foundation established at trial eliminated any chance of misidentification which might have proved violative of due process. *cf. Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977); *State v. Long*, 408 So.2d 1221 (La.1982); *State v. Guiden*, 399 So.2d 194 (La.1981); *State v. Doucet*, 380 So.2d 606 (La.1977); *State v. Vaughn*, 378 So.2d 906 (La.1979).

This assignment is without merit.

ARGUMENT NO. IV

(Assignment of Error No. 19)

By this assignment, the defendant argues that the trial court erred in refusing to allow the jury to view the crime scene. More specifically, he urges that the jury should have been allowed to view the scene and trace the route followed by Deputy Vanderhoeven under conditions similar to those on the night of the murder, since Vanderhoeven's ability to observe and identify him was very much at issue.

The trial judge based his refusal on the grounds that it would have been virtually impossible to recreate the exact scene and lighting conditions as they had existed on the night of the incident and would have entailed placing each juror in a police cruiser late at night. Furthermore, the trial judge noted that the jury had been supplied with pictures of the scene, a map of the scene and the route followed by Vanderhoeven, and ample testimony as to the lighting conditions. Moreover, Vanderhoeven had been subjected to cross-examination at length concerning the lighting conditions.

[7] It is well-settled that the decision regarding whether to grant or deny a motion to have the jury view the scene of the crime is within the sound discretion of the trial court, and such a ruling will not be disturbed on appeal absent an abuse of that discretion. La.C.Cr.P. art. 762(2); *State v. Johnson*, 404 So.2d 239 (La.1981), cert. denied, *Kelly v. Louisiana*, 456 U.S. 925, 102 S.Ct. 1970, 72 L.Ed.2d 440 (1982); *State v. Gallow*, 338 So.2d 920 (La.1976); *State v. Nix*, 327 So.2d 301 (La.1976), cert. denied, *Fulford v. Louisiana*, 425 U.S. 954, 96 S.Ct. 1732, 48 L.Ed.2d 198.

[8] Given the circumstances of this case, the trial court did not abuse its great discretion in denying the motion. The logistics involved made compliance with the request virtually impossible without a wholesale disruption of the proceedings. Furthermore, there was ample evidence before the jury which made clear the layout of the crime scene, the route followed by the two vehicles, and the lighting conditions under which Vanderhoeven had observed the incident. It was not necessary for the jury to view the scene in order for the defendant to receive a fair and impartial trial.

This assignment is without merit.

ARGUMENT NO. V

(Assignment of Error No. 25)

By this assignment, the defendant urges that there is insufficient evidence to support the verdict of guilty of first degree murder because the state presented no evidence which established that he had been personally involved in the abduction or that he had personally killed the victim.[7] We find these arguments unpersuasive.

7. By this assignment, the defendant also urges that imposition of the death penalty under the

LSA-R.S. 14:30 defines first degree murder as:

"[T]he killing of a human being:

(1) When the offender has the specific intent to kill or inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery;"

[9] The proper standard of appellate review for a sufficiency claim is whether, "after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Long*, 408 So.2d 1221 (La. 1982). Where the evidence against the accused is circumstantial, the standard is whether, taking as proved all facts which the evidence tends to prove, every reasonable hypothesis of innocence has been excluded. LSA-R.S. 15:438; *State v. Graham*, 422 So.2d 123 (La.1982); *cf. State v. Buxton*, 416 So.2d 71 (La.1982); *State v. Ennis*, 414 So.2d 661 (La.1982); *State v. Austin*, 399 So.2d 158 (La.1981).

As we noted in *State v. Graham*, *supra*, a combining of these two standards could lead to an impermissible blurring of the proper role appellate courts should assume in evaluating sufficiency claims in a circumstantial evidence cases:

"In previous opinions we have attempted to formulate a single precept incorporating both standards. See, e.g., *State v. Austin*, 399 So.2d 158 (La.1981). ("Therefore, when we review a conviction based upon circumstantial evidence we must determine that, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have concluded beyond a reasonable doubt that every reasonable hypothesis of innocence had been excluded." Id. p. 160). Upon further reflection, however, a merger does not appear to promote clarity but could lead to a distortion of the standards. A combination of the rules may incorrectly imply that, when all of the evidence of the defendant's guilt is circumstantial, due process requires more than evidence which would satisfy any rational juror of proof of guilty beyond a reasonable doubt. On the other hand, an in-tandem articulation may seem improperly to diminish the requirement of the circumstantial evidence rule by implying that, in a close case, this court will defer to the jury's finding rather than follow its own determination of whether there is a reasonable hypothesis of innocence. Although in many instances separate and dual applications of the rules will yield the same result, out of an abundance of caution we will proceed to apply each standard separately, as it was given to us by the framers." *Id.* at 129.

Proceeding with the "abundance of caution" we spoke of in *Graham*, we will apply each standard separately to the facts of this case.

[10] Here, the evidence against the defendant, albeit circumstantial, is overwhelming.[8]

Margaret Weems, the defendant's niece, testified at trial that the defendant had told

facts of this case is unconstitutional in light of the recent opinion of the United States Supreme Court in *Enmund v. Florida*, — U.S. —, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). The defendant also urges on the issue of the death sentence that the evidence is insufficient to establish the existence of any of the requisite aggravating circumstances, particularly the finding of the jury that the crime had been committed in an especially cruel manner. These arguments will be addressed more fully in our review of the penalty phase of the trial, *infra*.

8. In *Graham*, we noted the difference between "direct" and "circumstantial" evidence. While much of the evidence in this case arose from the direct observations of the witnesses, the evidence was introduced in furtherance of a proposition other than the mere truth of the fact asserted, i.e., the evidence was introduced to prove that the defendant was the killer. *cf.* 422 So.2d at 129-130.

her a week to ten days prior to the murder that he intended to rob the Shop-Mor, shoot Harold Austin "in the back", and "throw him in a road ditch." Mrs. Weems and her son, Carl, both testified that the defendant owned a .380 caliber pistol. On the same day that the defendant told Mrs. Weems of his intention to rob and kill Harold Austin, the defendant and Vincent Orlando visited the Weems household and gave to Mrs. Weems a .380 caliber pistol and a 9 millimeter automatic for her to hold while they were at the house. Mrs. Weems testified that the defendant and Orlando took the guns with them when they left the next day, wrapping them in a small towel.

Mrs. Weems testified further that when she informed the defendant that he was being sought in connection with the murder, he stated, "The old S.O.B. is dead and there isn't any witnesses." Mrs. Weems also testified that the defendant told her that "there wasn't any woman involved" when she told him that her children had advised her that the police might want to question her about the incident.

Ralph Guy, Linda Reed's ex-boyfriend, testified that the defendant was supposed to have been babysitting Linda's three children at her residence from about 4:00 p.m. on the evening of the murder, but that the defendant was not there when he went to the residence between midnight and 1:00 a.m. Guy had received several calls from the children earlier in the evening. Mrs. Weems testified that she had been calling the residence from about 6:00 p.m. to 9:00 p.m. on the night of the murder looking for the defendant, last trying at 9:09 p.m., but "it was a kid kept answering the phone." She finally reached the defendant at about 4:00 a.m., and she testified that he said he "had just come in . . . [from] out trying to score some money." Mrs. Weems testified that it usually took about four hours to drive from Tioga to Houston.

Earnest O'Dell, a disc jockey at a Houston nightclub, testified that he was approached at the club by the defendant and Vincent Orlando the night after the murder and that the defendant told him to tell the police that he (Moore) had been in the club on the night of the incident because they were trying to "pin a rap on him" for a murder in Louisiana. O'Dell's testimony was corroborated by the club's owner, Robert Fields, who testified that he had seen the defendant and Orlando approach O'Dell at the club on the night following the killing. Laura Simms, a dancer at the club, testified that she was also approached by the two and that the defendant told her not to say anything about his presence in Louisiana on the night of the murder.

Mrs. Austin, the victim's wife, testified that her husband had told her about a week before the murder that Michael Ebey had told him that there might be a robbery attempt at the store. Ebey testified that he learned of the defendant's plan to rob and murder the victim a few days prior to the incident from Mrs. Weems daughter, Karen. Mrs. Austin accounted for her husband's possessions as he left for work the afternoon of the killing and testified that he had carried with him $220 in cash (which was to be deposited in their savings account on Monday), a .38 caliber pistol, a pocketknife, and the combination to the store safe. These items were missing from Austin's body.

James Milligan, the last customer to see Harold Austin alive, testified that he left the store just minutes before closing time and observed the defendant's vehicle to the left side of the store, out of view from anyone inside, at approximately 10:00 p.m. At trial, he identified photographs of the defendant's car as the vehicle he had seen beside the store. Deputy Vanderhoeven gave extensive testimony concerning his observations on the night of the incident and made a positive in-court identification of the defendant as the driver of the vehicle. Larry Craven, who lived approximately 100 yards from where the victim's body was found testified that he heard a single gunshot at about 10:30 p.m. on the night of the murder. Raymond Cooper, a criminalistics expert, testified that plaster casts of tire imprints found near the body matched by class the tires on the defendant's vehicle.

Viewing this great body of evidence in the light most favorable to the prosecution, we must conclude that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The evidence is uncontroverted that the victim was robbed of his valuables at gun-point and shot to death. Specific intent may be inferred from the circumstances of the transaction. LSA-R.S. 15:445; *State v. Motton*, 396 So.2d 1337 (La.1981). Given the extensive testimony concerning the defendant's prior threats to rob and kill the victim, any rational trier of fact could have concluded that the defendant shot the victim with specific intent to kill while engaged in the perpetration of an armed robbery.[9]

Since no witness actually saw the defendant shoot the victim, the evidence against him is circumstantial. However, again viewing this great body of circumstantial evidence, and, taking as proved each fact which the evidence tends to prove, we must conclude that every reasonable hypothesis of innocence has been excluded. Indeed, the defendant presented no evidence from which any other reasonable hypothesis might be drawn; rather, he chose to rest on his right not to present any evidence in his behalf. *cf. State v. Graham*, supra.[10]

This assignment has no merit.

REVIEW OF THE PENALTY PHASE

Under La.C.Cr.P. art. 905.9, we are required to review each death sentence to determine whether it is excessive. Pursuant to the mandate of that provision that this court establish procedures to satisfy constitutional criteria for such review, Supreme Court Rule 28, § 1 provides:

> "Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:
>
> (a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and
>
> (b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and
>
> (c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

In compliance with Rule 28, § 3, the trial judge submitted a Uniform Capital sentencing report which revealed the following facts: The defendant is a 64 year old white male with an eleventh grade education and low intelligence level (IQ 70). He is a diabetic and had his right leg amputated while in prison awaiting trial due to complications with the disease. He worked as a pipefitter from 1939–1967.

The defendant had three convictions prior to the present offense: a 1947 conviction for cow theft, for which he was sentenced to six months in jail; a 1948 conviction for theft of a government property, for which he was placed on three years of federal probation; a 1967 conviction for manslaughter, for which he was sentenced to 21 years.[11] The defendant served eleven years of that sentence and committed the instant offense within two years of his release from Angola.

Passion, prejudice or other arbitrary factors

In his sentence review memorandum, the defendant argues that the jury was pre-dis-

9. Even if the defendant did not fire the fatal shot, he was clearly a principal who shared with the actual killer the specific intent to kill the victim. LSA-R.S. 14:24; *State v. Holmes*, 388 So.2d 722 (La.1981); *State v. McAllister*, 366 So.2d 1340 (La.1979). Even if another of the occupants of the car actually pulled the trigger, the evidence adduced at trial was such that any rational trier of fact could have concluded that the defendant had the specific intent to rob and kill the victim. He was therefore properly convicted of first degree murder.

10. The defendant in *Graham* put on evidence in an attempt to show affirmatively that someone else had committed the murder.

11. The defendant, along with two accomplices, pleaded guilty to killing his wife. The woman had been insured for $70,000 prior to her death, and her beaten and burned body was found in the burned-out wreckage of her car alongside a rural Grant Parish road. The plan was to make it appear as though the woman had died in an accident.

posed toward imposition of the death sentence because the trial court had improperly excused any juror who had expressed an opposition to the death penalty. *cf. Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). For the reasons assigned in our disposition of Argument No. 1, *supra*, this contention is without merit.

All nine jurors who had expressed an opposition to the death penalty were properly excused. The trial court questioned each extensively in order to be certain that each could not impose the death penalty under any circumstances. The one prospective juror who expressed only a general objection to the death penalty was challenged peremptorily by the state. As we noted earlier, this isolated instance of a state peremptory challenge against such a prospective juror did not render the jury unconstitutionally tainted within the meaning of *Witherspoon*.

The defendant argues further in memorandum that the state engaged in "prosecutorial rhetoric" during closing argument at the penalty phase in an attempt to inflame the emotions of the jury to ensure that it would recommend the death penalty. Specifically, he contends that the state improperly asked the jury to return a death recommendation because "[j]ustice has been waiting for years for this penalty." The prosecutor made the comment in the following context:

. . . . . .

> "You have to return the death penalty unanimously. Twelve heads, twelve people, twelve opinions. Go in the back and deliberate for just a short period. Please return a verdict. *Justice has been waiting for years for this penalty.* Since January of 1981, the state has been waiting for the appropriate penalty to be imposed *in this case* and the state submit [sic] from the evidence that it's murder during an armed robbery and that the only penalty you can therefore find properly under your duty as a juror is death as the sentence." (emphasis supplied)

. . . . . .

[11] The defendant contends that this portion of the argument served as a commentary on the fact that it had been a long time since a death sentence had been imposed in Rapides Parish, intimating that the commentary served to pressure the jury into shouldering the responsibility for re-instituting the death penalty in Rapides Parish, even if this were not the appropriate case. We find this argument unpersuasive.

La.C.Cr.P. art. 774 provides:

> "The argument shall be confined to evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case.
>
> The argument shall not appeal to prejudice.
>
> The state's rebuttal shall be confined to answering the argument of the defendant."

The general rule with regard to improper argument is whether the jury was influenced by the remarks and whether the remarks contributed to the verdict. *State v. Monroe*, 397 So.2d 1258 (La.1981). Where the death penalty has been imposed, however, we are not to be constrained by the general doctrine of reversible error; we must determine whether the argument injected into the penalty proceeding passion, prejudice or any other arbitrary factor which contributed to the jury's recommendation of the death penalty. La.Sup.Ct. Rule 28, § 1(a); *State v. Lindsey*, 404 So.2d 466 (La.1981); *State v. Monroe*, *supra*.

[12] In our view, the prosecutor's comment that "[j]ustice has been waiting for years for this penalty" was fairly within the permissible scope of closing argument, even in a death penalty case, and did not serve to incite the passions of the jury, prejudice the defendant, or constitute an arbitrary factor which weighed unduly in the jury's deliberations.

The reasonable interpretation of the prosecutor's comment is that the state has been waiting for years for the death penalty to be imposed *in this case*. It is not improper argument for the state to request that the jury return a recommendation of death. *cf.*

State v. Lewis, 156 La. 985, 101 So. 386 (1924); *State v. Reeves*, 129 La. 714, 56 So. 648 (1912). In our opinion, the prosecutor's comment was merely a request that the jury return a recommendation of death and did not serve to pressure the jury into re-instituting the death penalty in Rapides Parish irrespective of the merits of this particular case.

In addition, the defendant found the following passage from the state's argument particularly objectionable:

. . . . . .

"Think of the fear that was then present for a man that was going to see his wife, but then he's a victim of a crime. Watch Mr. Austin get in the car, being shoved in. Watch him being held down. Feel what he felt from the evidence from being held in place with people on both sides, armed with weapons, seeing help just a little bit away, the Deputy Sheriff's car, without being able to call out and not being able to get a message off."

. . . . . .

Following the particular passage cited by the defendant, the argument continued as follows:

. . . . . .

"The terror of being captive in a car with people with guns taking money from him and his own personal weapon that he had in order to prevent someone from robbing him, the combination to the safe and his knife.

Drive with him on the route that you saw on the map pleading for mercy, terrorized, held in place.

Continue on and see the Deputy Sheriff not having enough to stop the car because the store is secured, the store that they secured. Watch that Deputy Sheriff car leave.

The last thought: God, I'm by myself.

Continue on for approximately three more miles to the scene at Burma Road. Held in the back seat. Feel the thoughts. Feel the feelings. All I have is four kids and a wife that I want to go home to. I never asked for this.

The car stops, he's pushed out, walked out . . . Mr. Austin is not here to tell us what happened, but we know one thing. He's shot in the back. Shot in the back and left to die by bleeding to death.

Death isn't pretty. It wasn't pretty that night at the scene when I walked up there, but I'm asking you to look at something because I don't know how close you looked at it, but as he lay there in the ditch, he has the face of death. The victim knew he was dying. Shot and bleeding to death from the gunshot wound administered to him by the defendant and his co-defendants. That's fear. That's pain. That's suffering."

. . . . . .

The thrust of the state's argument asked the jurors to place themselves in the shoes of the victim. The prosecutor also described the victim's death. The defendant asserts that the prosecutor thereby "[took] the jury on a trip where no evidence before it had gone; [and asked] it to experience emotions about which there was no evidence . . . ." He contends that this "prosecutorial rhetoric" was calculated to "incite the passions of this 'capital jury.'" We likewise find this argument unpersuasive.

[13, 14] While the prosecutor must base his conclusions and deductions upon the evidence adduced at trial to stay within the parameters of La.C.Cr.P. art. 774, both the state and the defense are entitled to their own conclusions as to what is established by the evidence and may press upon the jury any view arising out of the evidence. *State v. Prince*, 270 So.2d 850 (La.1972); *State v. Alexander*, 215 La. 245, 40 So.2d 232 (1949). Statements of the prosecutor referring to the manner in which the victim was killed are within the proper bounds of closing argument. *State v. Whitmore*, 353 So.2d 1286 (La.1977). At trial, the medical examiner testified by deposition that the victim bled to death within a matter of minutes as a result of the gunshot wound. In our opinion, the reference to the manner of death was appropriate in light of the evidence adduced at trial and did not serve to incite the passions of the jury, prejudice the

defendant, or constitute any arbitrary factor which weighed improperly in the jury's deliberations.

As to the request that each juror place himself in the shoes of the victim, our law requires that each juror rely only on his memory of the evidence in reaching a verdict, and in so doing, we necessarily ask that each juror draw upon his general knowledge and experiences in deciding the case. *cf.* La.C.Cr.P. art. 793; *State v. Graham*, 422 So.2d 123 (La.1982); see also C. Joseph and R. Lamonica, Louisiana Jury Instructions, Criminal, §§ 2.2, 3.4 (1980). It is not unreasonable to infer from the facts of this case, in the light of ordinary human experience, that the victim underwent a great deal of emotional distress prior to his death. He had been warned sometime prior to the incident that he might be robbed and killed. He was abducted at gunpoint from his store late at night and pushed into the back seat of an automobile occupied by four persons. These persons drove very slowly out into the darkened country side and took from him his valuables. He was made to exit the vehicle into the January cold and stand in the darkness at the edge of a gravel road. He was then shot in the back. These facts are uncontroverted.

It is not beyond the scope of normal human behavior and experience to imagine one's self in the shoes of a crime victim, and it is not inconceivable that many, if not all, of the jurors in this case, in viewing the evidence adduced at trial, took into account the emotions experienced by the victim prior to his death in rendering their verdict and penalty recommendation. We cannot view the prosecutor's argument in any vein other than as an appeal to the jury to apply their general knowledge and experience to the evidence adduced at trial before rendering their recommendation, and we are hereby unwilling to establish a rule which would *per se* prohibit the state from asking jurors to place themselves in the shoes of the victim. While it is the function of this court to ensure that criminal defendants do not fall prey to a "lynch mob" mentality, we cannot expect jurors to be cold machines devoid of human emotion. We are of the opinion that the prosecutor's request was sufficiently confined to the evidence and any permissible inferences which could have been fairly drawn therefrom within the meaning of La.C.Cr.P. art. 774. We are likewise of the view that the request did not inject into the penalty proceeding any undue passion, prejudice or other arbitrary factor which unfairly influenced the jury's recommendation that the defendant be sentenced to death.

[15] Our further review of the record has disclosed no factors which might have acted as an improper influence on the jury in returning its recommendation. There was no mention of the defendant's potential for future release should he be given life imprisonment, nor were any references made as to appellate review of death sentences. *cf. State v. Moore*, 414 So.2d 340 (La.1982); *State v. Willie*, 410 So.2d 1019 (La.1982); *State v. Lindsey*, 404 So.2d 466 (La.1982); *State v. Sonnier*, 379 So.2d 1336 (La.1980). Our review of the trial court's instructions at the penalty hearing uncovered no improper instruction which might have injected into the jury's deliberations an arbitrary factor necessitating reversal of the sentence. *cf. State v. Brogdon*, 426 So.2d 158 (La.1983); *State v. David*, 425 So.2d 1241 (La.1983); *State v. Watson*, 423 So.2d 1130 (La.1982).

For these reasons, in accordance with Rule 28, § 1(a), we find that the sentence was not imposed under the influence of passion, prejudice or any other arbitrary factor which might require that we set the sentence aside.

Aggravating circumstances

[16] In returning its recommendation, the jury found two statutory aggravating circumstances: (1) the defendant had been engaged in the perpetration of an armed robbery and an aggravating kidnapping at the time he killed the victim, and (2) the offense had been committed in an especially cruel manner. La.C.Cr.P. art. 905.4, §§ (a),

(g).[12] The defendant argues that the evidence is insufficient to support the finding of any aggravating circumstances under art. 905.4, especially the finding of the jury that the offense was committed in an especially cruel manner.

The use of statutory aggravating circumstances as a prerequisite to a recommendation of death serves to provide a uniform structure within which to channel the jury discretion which is so vital to the constitutionality of our capital sentencing scheme. See *State v. Sawyer*, 422 So.2d 96, 102, n. 13 (La.1982); *cf. Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Zant v. Stephens*, 250 Ga. 97, 297 S.E.2d 1, 3 (Ga.1982), on certification from the United States Supreme Court, — U.S. —, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982). If its discretion were unbridled, the jury might be tempted to go far afield of these constitutionally-charted bounds and render its recommendation based solely on arbitrary factors unrelated to the evidence adduced at trial.

In *State v. Sawyer*, *supra*, we held that it is only necessary that the evidence be sufficient to support the existence of one statutory aggravating circumstance forming the basis for the jury's recommendation:[13]

"The adequately supported finding of the existence of one aggravating circumstance is alone sufficient to place defendant in that category of offenders properly

12. La.C.Cr.P. art. 905.3 provides:

"A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed. The jury shall be furnished with a copy of the statutory aggravating and mitigating circumstances."

La.C.Cr.P. art. 905.4 lists the following aggravating circumstances:

* * * * * *

"(a) the offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or simple robbery;

(b) the victim was a fireman or peace officer engaged in his lawful duties;

(c) the offender was previously convicted of an unrelated murder, aggravated rape, or aggravated kidnapping or has a significant prior history of criminal activity;

(d) the offender knowingly created a risk of death or great bodily harm to more than one person;

(e) the offender offered or has been offered or has given or received anything of value for the commission of the offense;

(f) the offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony;

(g) the offense was committed in an especially heinous, atrocious, or cruel manner; or

(h) the victim was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant;

(i) the victim was a correctional officer or any employee of the Louisiana Department of Corrections who, in the normal course of his employment was required to come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in his lawful duties at the time of the offense."

* * * * * *

13. Compare *Zant v. Stephens*, *supra*. The question certified was: "What are the premises of state law that support the conclusion that the death sentence in this case is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury?" *Stephens* involved a situation where the jury recommended the death penalty on the basis of two statutory aggravating circumstances, one of which proved facially unconstitutional as too vague. *Arnold v. State*, 236 Ga. 534, 224 S.E.2d 386 (Ga.1976). The Georgia Supreme Court answered the question certified by finding that the evidence supported the existence of at least one constitutionally-valid aggravating circumstance. The court ruled further that the constitutional invalidity of one aggravating circumstance should not bar, at least not under Georgia law, imposition of the death penalty in this particular case because the evidence upon which the jury had found the constitutionally-invalid aggravating circumstance had a relevance and ground for admissibility independent of the statutory aggravating circumstance upon which the jury had relied, and therefore did not inject into the penalty proceeding an arbitrary factor. 297 S.E.2d at 4.

As we noted in *Sawyer*, the *Stephens* case is distinguishable. Neither *Sawyer* nor the instant case involved a constitutionally-invalid aggravating circumstance.

exposed to the possibility of the death sentence. (citations and footnote omitted)

Thus, under Louisiana's statutory scheme, the jury at the penalty trial must in effect make two separate but closely related findings in order to recommend a death sentence. The jury must first find the existence of at least one statutory aggravating circumstance as a threshold requirement before even considering imposition of the death penalty. If an aggravating circumstance is found, then the jury must take into account any mitigating circumstances and must make a separate finding regarding whether the death penalty should be imposed, considering both the particular crime and the particular offender. If the jury recommends the death penalty, this court must review each of the two separate jury findings." 422 So.2d at 101-102.

We noted further that should it be ultimately determined that the evidence only supported the existence of one statutory aggravating circumstance, then the fact that the evidence did not support the existence of any *additional* aggravating circumstances which may have been found by the jury had no effect on the *availability* of the death penalty for the particular offender; rather, the absence of any additional aggravating circumstances would be pertinent to our review of the sentence in accord with Rule 28, § 1(c), whereby we examine whether the death sentence is appropriate for the particular offender, considering both the circumstances of the crime and the propensities of the individual defendant.[14] 422 So.2d at 102; see our discussion of the proportionality of the sentence imposed in this case, *infra*.

Based on our review of the record, we agree with the defendant's contention that the evidence is not sufficient to support the jury's finding that he was engaged in the perpetration of an aggravated kidnapping at the time he killed the victim and that the offense was committed in an especially cruel manner; however, for the reasons assigned in our treatment of Argument No. V, *supra*, we do find the evidence sufficient to support the jury's determination that the defendant was engaged in the perpetration of an armed robbery at the time of the killing.

We have construed La.C.Cr.P. art. 905.4(g) to incorporate the idea that in order to find that the offense was committed in an "especially heinous, atrocious or cruel manner" there must have been some degree of "torture or pitiless infliction of unnecessary pain on the victim." *State v. Sonnier*, 379 So.2d 1336 (La.1979) (on original rehearing); *State v. English*, 367 So.2d 815 (La.1979). Generally, physical abuse of the victim is necessary, with death being brought about in a "particularly painful and inhuman manner." *State v. Baldwin*, 388 So.2d 664 (La.1980); *cf. State v. Taylor*, 422 So.2d 109 (La.1982); *State v. Moore*, 414 So.2d 340 (La.1982); *State v. Clark*, 387 So.2d 1124 (La.1980). Although we can infer from the evidence adduced at trial that the victim was subjected most certainly to a great deal of fear and anguish prior to his murder, the

14. We also noted in *Sawyer* that the facts of the case required our discussion of whether the introduction of evidence by the state at the penalty phase in support of an unproved aggravating circumstance (a prior Arkansas conviction for involuntary manslaughter) introduced into the penalty proceeding an arbitrary factor which might have misdirected the jury's sentencing discretion. We ultimately determined that it did not. 422 So.2d 102-104.

We find the circumstances presented in this case distinguishable from *Sawyer*. In our opinion, the finding of the jury that the defendant had been engaged in the perpetration of an aggravated kidnapping and that the murder had been committed in an especially cruel manner were based solely on the evidence adduced at trial and were not based on any attempt by the state to prove in the penalty proceeding that these aggravating circumstances actually existed. In fact, in his argument at the penalty phase, the prosecutor repeatedly urged the jury to find *only* armed robbery as an aggravating circumstance. La.C.Cr.P. art. 905.4(a). Since there was introduced no evidence in support of these unproved aggravating circumstances and no argument furthered in their support, we find the existence of no arbitrary factor which may have incited the passions of the jury, prejudiced the defendant, or weighed unfairly in the jury's deliberations.

killing was not committed in an especially cruel manner within the meaning of the prior jurisprudence. Therefore, the jury erred in finding this an aggravating circumstance.

Aggravated kidnapping is defined as the forcible seizing and carrying of a person from one place to another with the intent of forcing the victim or some other person to give up anything of present or prospective value in order to secure a release of the person seized. LSA-R.S. 14:44(1); *State v. Polk*, 376 So.2d 151 (La.1979). Although the evidence establishes that the victim was forcibly seized and deprived of his valuables, the essential element of the crime, intent to deprive *in order to secure a release*, is missing. There is no evidence in the record from which any rational trier of fact could have concluded that the victim was deprived of his valuables in exchange for his release or promise of release. The crime of aggravated kidnapping is limited to cases of kidnapping for ransom (i.e., kidnapping with intent to extort). LSA-R.S. 14:44, comment; *State v. English*, 387 So.2d 815, appendix at 823 (La.1979). Therefore, the jury erred in finding aggravating kidnapping as an aggravating circumstance under La.C.Cr.P. art. 905.4.

As we noted earlier, however, the jury's finding that the murder was committed during the perpetration of an armed robbery is clearly supported by the evidence. The victim left his home on the day of the killing with $230 cash, the combination to the store safe, a .38 caliber pistol, and a pocketknife. These items were missing from the victim's body. Witnesses testified that the defendant had threatened to rob the victim, "shoot him in the back, and throw him in a road ditch," and that he stated, "The old SOB is dead and there isn't any witnesses," when he was told that the police were seeking him in connection with the killing. The evidence was such that any rational trier of fact could have concluded that the state had proved, beyond a reasonable doubt, that the defendant had shot the victim with the specific intent to kill during the perpetration of an armed robbery.

For these reasons, in accordance with Rule 28, § 1(b), we find that the evidence supports the jury's finding of a statutory aggravating circumstance.

Proportionality of sentence

[17] The final step in our sentence review calls for our determination as to whether the sentence is "disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Rule 28, § 1(c). Since an inference of arbitrariness arises when the jury's recommendation is inconsistent with sentences imposed in similar cases from the same jurisdiction (see *State v. Sonnier*, 380 So.2d 1 (La.1979)), our review generally entails a comparison and analysis of other cases involving similar facts. However, the defendant also urges that the death penalty may not be constitutionally imposed against him in light of the recent United States Supreme Court ruling in *Enmund v. Florida*, — U.S. —, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

In *Enmund*, the high court held that the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments where the condemned "neither took life, attempted to take life, nor intended to take life." 102 S.Ct. at 3371. The defendant, Earl Enmund, had been convicted of first degree murder, as was a co-defendant. The co-defendant and a woman robbed and killed two elderly persons after appearing at the door of their farmhouse pretending to have an overheated car. Enmund waited at the road in the getaway car. The high court held that even though Enmund had been properly convicted of first degree murder under state law, the death penalty, which is "unique in its severity and irrevocability," constituted an "excessive penalty for the robber, who, as such, does not take human life." *Id.*, 102 S.Ct. at 3377.

We find *Enmund* clearly distinguishable from the instant case. The defendant's argument that the death penalty may not be constitutionally imposed against him is predicated upon our finding that the evi-

dence is insufficient to support his first degree murder conviction, i.e., that the state failed to prove that he shot the victim with the specific intent to kill during the perpetration of an armed robbery. We expressly rejected that contention in our disposition of Argument No. V, *supra*. We reject it again in analyzing the proportionality of the sentence in light of *Enmund*.

The jury's finding that the murder was committed during the perpetration of an armed robbery is clearly supported by the evidence. The valuables which the victim had carried with him on the day of the robbery, including $230 cash and a .38 caliber pistol, were missing from the victim's body. Witnesses testified that the defendant had threatened to rob the victim, "shoot him in the back, and throw him in a road ditch," and that he stated, "The old SOB is dead and there isn't any witnesses," when he was told that he was being sought by police in connection with the killing. Applying the standard enunciated in *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), the evidence was such that any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found each essential element of the crime beyond a reasonable doubt. Unlike the defendant in *Enmund*, the evidence in this case established that the defendant "intended to take life, attempted to take life, and actually took life."[18]

In reviewing other cases from the same jurisdiction, the only case in which the death penalty was imposed in Rapides Parish since our present death penalty law took effect on January 1, 1976 was *State v. Felde*, 422 So.2d 370 (La.1982). The defendant in *Felde* was convicted of first degree murder for shooting to death a Shreveport policeman. In recommending the death penalty, the jury found as its sole aggravating circumstance that the defendant had killed a policeman who was acting in the line of duty. The defense urged was one of "post-traumatic stress syndrome" arising out of the defendant's service in Vietnam, and the facts of the case make it generally inapposite to the instant case.

All other cases where a first degree murder indictment had been returned in Rapides Parish were either plea bargained to lesser charges or the jury returned responsive verdicts of second degree murder or manslaughter. Our review of these cases has uncovered none which are similar to this case in fact, verdict, or sentence; nevertheless, the defendant asserts in his sentence memorandum that his sentence is disproportionate to the sentences rendered in *State v. Willis* (No. 175,609) and *State v. Gray and Mikkelson* (No. 173,544).

In *State v. Willis*, defendant Jimmy Wade Willis pleaded guilty to a reduced charge of manslaughter for the shooting death of Roy Cloud. The shooting grew out of an argument over a disputed debt of $90 which Willis allegedly owed to Cloud. Willis had reportedly stated sometime prior to the killing that he was going to have to kill Cloud because he owed Cloud some money and "wasn't about to pay it back." He was sentenced to twenty-one years.

In *State v. Gray and Mikkelson*, Lawrence Gray masterminded a plan whereby he and a friend, Richard Mikkelson, were to lure their victim to a deserted Army camp in rural Rapides Parish for the purpose of robbing him of $380 the two believed he was carrying. The apparent "bait" was the use of drugs. Once at the pre-planned site, Gray handed Mikkelson a .45 caliber automatic he had purchased specifically for the robbery and killing, and Mikkelson shot the victim once in the chest and once in the head. The evidence showed that both defendants had been using drugs and alcohol heavily before the incident. Gray pleaded

18. See n. 9, *supra*. Even if the defendant were not the actual trigger man, *Enmund* would still not preclude imposition of the death penalty in this case. The evidence adduced at trial was such that any rational trier of fact could have found, beyond a reasonable doubt, that the defendant shared with the actual killer the specific intent to rob and kill the victim. *Enmund* precludes imposition of the death penalty where the robber "neither took life, attempted to take life, nor *intended* to take life."

guilty to the reduced charge of manslaughter and was sentenced to twenty-one years. Mikkelson pleaded guilty to the reduced charge of second degree murder and was sentenced to life imprisonment without benefit of parole, probation or suspension of sentence.

We cannot say that the death sentence imposed in this case is disproportionate to the penalty imposed in similar cases in Rapides Parish. We are of the opinion that there are no cases sufficiently similar to the instant case to which we could make a fair comparison. In *Willis* and *Gray and Mikkelson*, the sentences imposed were derived from plea bargains with the state, and the cases never went to a jury for a determination of whether the death penalty was appropriate. Additionally, the facts of those cases are too disparate from those presented in this case to allow a fair comparison.

However, we have found cases from other jurisdictions which allow for a more fair comparison, and these cases justify imposition of the death sentence in this case.

In *State v. Matthews*, 407 So.2d 1150 (La.1981), the 54 year old defendant shot and killed the victim with a sawed-off shotgun during a robbery of a beauty salon. Some twenty-five women were held captive during the robbery. We upheld the Orleans Parish jury's recommendation of death, noting in particular the circumstances surrounding the robbery, the defendant's significant prior criminal record (which included three prior armed robbery convictions), and the advanced planning which had gone into this particular crime.

In *State v. Williams*, 383 So.2d 369 (La. 1980), the defendant killed a security guard with a sawed-off shotgun during a grocery store robbery, and two other persons were injured. We upheld the recommendation of the East Baton Rouge Parish jury that the defendant be sentenced to death, despite the fact that the defendant suffered from a drug problem and had no significant prior criminal history. We also noted that at the time of the defendant's conviction, there had been handed down three prior death sentences in East Baton Rouge Parish, and all of those cases involved murders committed in the perpetration of armed robberies.

In our opinion, the death penalty is not disproportionate to the penalty imposed in these similar cases where the jury found armed robbery as an aggravating circumstance, and considering the circumstances surrounding the commission of this crime and the characteristics of this defendant. This case involved a premeditated, calculated robbery and murder. There is no evidence that the crime was either conceived or carried out under the influence of duress, drugs, alcohol, acute emotional distress or any other factor which might mitigate against imposition of the death penalty.[18] The defendant conceived this plan within two years of his release from Angola where he was serving a twenty-one year sentence for manslaughter. Approximately a week to ten days prior to the murder the defend-

18. See La.C.Cr.P. art. 905.5 which sets out the following mitigating circumstances which the jury must consider, in accordance with La.C.Cr.P. art. 905.3, before recommending a sentence of death:

* * * * * *

"(a) The offender has no significant prior history of criminal activity;

(b) The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;

(c) The offense was committed while the offender was under the influence or under the domination of another person;

(d) The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct;

(e) At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;

(f) The youth of the offender at the time of the offense;

(g) The offender was a principal whose participation was relatively minor;

(h) Any other relevant mitigating circumstance."

Not only did the jury fail to find any of these mitigating circumstances applicable in this case, there was little, if any, evidence in the record from which the presence of such circumstances could be inferred.

ant made known his intention to rob the victim, "shoot him in the back, and throw him in a road ditch." The victim was abducted late at night, robbed of his valuables, and shot to death execution-style beside a deserted rural road. This is the type of defendant for whom the death sentence is appropriate.

For these reasons, in accordance with Rule 28, § 1(e), we have not found the death penalty disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

DECREE

The conviction and sentence of the defendant, Avery C. "Pete" Moore, are affirmed.

AFFIRMED.

MARCUS, J., concurs and assigns reasons.

MARCUS, Justice (concurring).

Since our appellate jurisdiction in criminal cases extends "only to questions of law," when a claim is made on appellate review that a person has been convicted on insufficient evidence, whether direct or circumstantial, our inquiry should be restricted to only whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. La. Const. art. 5, § 5(C) (1974). *Jackson v. Virginia*, 443 U.S. 307, 309, 99 S.Ct. 2781, 2783, 61 L.Ed.2d 560 (1977). In *Jackson*, the United States Supreme Court noted that this inquiry does not require a court to "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.... Once a defendant has been found guilty of the crime charged, the factfinder's roll as weigher of the evidence is preserved through a legal conclusion that upon judicial review all the evidence is to be considered in the light most favorable to the prosecution."

Accordingly, I respectfully concur.

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NUMBER_____

OCTOBER TERM, 1983

83-5367

AVERY C. (PETE) MOORE, PETITIONER

VERSUS

STATE OF LOUISIANA, RESPONDANT

ON PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF LOUISIANA, NUMBER 82-KA-1709

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS, UNDER RULE 46

STEPHEN E. EVERETT
ATTORNEY FOR PETITIONER
P. O. BOX 1842
827 JOHNSTON STREET
ALEXANDRIA, LOUISIANA 71301
(318) 443-6312

SUPREME COURT OF THE UNITED STATES

NUMBER_____

AVERY C. (PETE) MOORE, PETITIONER

VERSUS

STATE OF LOUISIANA, RESPONDANT

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

AVERY C. (PETE) MOORE, through his undersigned counsel, respectfully moves this Court to proceed In Forma Pauperis under the provisions of Rule 46, of Rules of this Court.

1.

Mover, as will appear from the affidavit annexed hereto, and required by the rules of this Court, is indigent, and is unable to pay the costs of the annexed Petition for Writs of Certiorari, and is unable to give security therefor.

2.

As appears from the Petition for Writs of Certiorari proposed to be filed by petitioner, mover is presently incarcerated in the Louisiana State Penitentiary awaiting execution of a sentence of death upon conviction of the crime of first degree murder, by a Louisiana Court, and the affirmance of that conviction by the Supreme Court of Louisiana, the said Court having denied rehearing of mover's case.

3.

Petitioner has no income whatsoever, has no assets or property, and was allowed, upon oral motion, by the trial judge below to present his appeal to

the Louisiana Supreme Court In Forma Pauperis, without payment of costs in advance, and being provided a free transcript.

4.

There are attached hereto, as required by Rule 46, an affidavit in the form prescribed by Federal Rules of Appellate Procedure Form 4, adapted for this case, as well as the substantive documents sought to be filed in this Court, the Petition for Certiorari.

WHEREFORE, mover prays that he be allowed to proceed herein, In Forma Pauperis, under the Provisions of Rule 46.

BY HIS ATTORNEY:

STEPHEN EDWARD EVERETT
ATTORNEY FOR PETITIONER_MOVER
827 JOHNSTON STREET
ALEXANDRIA, LOUISIANA 71301
(318) 443-6312

SUPREME COURT OF THE UNITED STATES

NUMBER_____

AVERY C. (PETE) MOORE, PETITIONER

VERSUS

STATE OF LOUISIANA, RESPONDANT

AFFIDAVIT IN SUPPORT OF
MOTION TO PROCEED IN FORMA PAUPERIS

I, AVERY C. MOORE, being first duly sworn, depose and say that I am the petitioner in the above entitled case; that in support of my Motion to Proceed in the Supreme Court of United States without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress on a Petition for Certiorari to the United States Supreme Court.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of filing said petition are true and correct.

1. Are you presently employed? No.

2. Have you received within the past twelve months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No.

3. Do you own any cash or checking or savings account? No.

4. Do you own any real estate, stocks, bond, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury, and this affidavit constitutes a declaration under penalty of perjury, within the meaning and intent of the laws of the United States.

Avery C. Moore
AVERY C. MOORE

SWORN TO AND SUBSCRIBED TO before me this 22nd day of August, 1983.

NOTARY PUBLIC
My Commission is for life

CERTIFICATION OF SERVICE

I, Stephen E. Everett, a member in good standing of the Bar of the Supreme Court of the United States, do hereby certify as follows:

1.

That, in connection with the above and foregoing Motion for Leave to Proceed In Forma Pauperis, the name and address of all parties to be served in connection therewith is as follows:

> The State of Louisiana, through the District Attorney, Rapides Parish, Louisiana, his Assistant, Mr. R. Greg Fowler, Rapides Parish Courthouse, Alexandria, Louisiana, 71301 (trial attorney).

2.

I further hereby certify that I have this date served a copy of the above and foregoing Motion upon the above mentioned individual, by delivering a copy of the same at his office at the Rapides Parish Courthouse, Louisiana, to him personnally, or to an employee within that office.

Alexandria, Louisiana, this 22 day of August, 1983.

STEPHEN EDWARD EVERETT

83-5367

NUMBER _____

Office - Supreme Court, U.S.
FILED
OCT 26 1983
ALEXANDER L. STEVAS
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

AVERY C. "PETE" MOORE

(PETITIONER)

VERSUS

STATE OF LOUISIANA

(RESPONDENT)

OPPOSITION BRIEF BY THE STATE OF LOUISIANA TO THE PETITION FOR WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

EDWIN O. WARE, III
STATE OF LOUISIANA
DISTRICT ATTORNEY'S OFFICE
P. O. DRAWER 1472
ALEXANDRIA, LOUISIANA 71301
(318) 473-6650

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ARGUMENT

1. HYPNOSIS:

The Louisiana Supreme Court at 425 So.2d 759, (1983), affirmed the use at trial of a deputy sheriff-witness who had been hypnotized in order to help him recall the identification of an unidentified female passenger in a get-away vehicle inwhich the petitioner, Moore was operating. The vehicle was used in an armed robbery, kidnapping and murder. The State submits that the Court in this case and by reference and incorporation of the June, 1982 motion to suppress hearing in the co-defendant's case of State vs. Wren and Orlando, properly permitted the use of the testimony after complete examination of the facts in this case, the law of the sister States, and the general consensus of the approval of hypnosis in certain investigative positions.

In order to provide a synopsis of the case and the facts, it is necessary to retrace the history of the case. Here, a deputy sheriff-witness, who was on duty the night the body of the victim was found, passed in front of the store where the victim worked, and observed a vehicle parked in front of the doors of the store. The officer went next door and parked, and observed an individual, who he did not recognize, run from the door of the store and enter the back of the vehicle. He followed the vehicle, observed the license number, the make, color and model of the car, observed the driver of the vehicle, the petitioner, who he described in his statements as an elderly white male with receding hair-line and glasses. He also described and identified several of the other in-dividuals in the car, but was not able to identify the person in the middle of the back seat, and a person in the front passenger seat. He believed the per-son in the front passenger seat was a female because of the silhouette of the hairline in the lights. He followed the car, checked with other officers and received a computer record's check on the license plate. He found out that the

vehicle belonged to the petitioner, Avery C. "Pete" Moore, and was registered to a nearby city's address. Other officers found no one at the store, and no signs of struggle or other crimes, reported their findings to the deputy sheriff-witness, who subsequently broke off surveillance. Some thirty (30) minutes later, a phone call reported the discovery of a white male's body, dead, in the ditch on a rural road in Ball, Louisiana, just a few miles from the last spot where the deputy sheriff-witness observed the vehicle heading. The victim, was later identified as the store manager, was found to have been robbed of his pocketknife, his own personal hand-gun weapon that he carried in a blue cloth sack, and several hundred dollars in currency which he kept in his wallet. At the scene were tire impressions, which were cast in plaster and later compared with the tires found on the petitioner's vehicle and which were of a general match per expert criminalistics witness's testimony. At approximately 6:00 a.m. the next morning, the officer identified the photographs of both the petitioner, and the co-defendant, Vincent Orlando, the defendant's roommate.

Subsequent to that night and approximately two (2) weeks after the initial identification, the deputy sheriff-witness again identified the petitioner and his co-defendants in a photographic line-up held some two (2) months prior to any attempt to hypnotize him. In the identification session, he also gave a very detailed account of that evening's activity. The purpose of this subsequent hypnosis which occurred in March, 1981, was an attempt by the law enforcement officers still investigating the crime to help the deputy sheriff-witness recall the otherwise unidentified female who was seated in the getaway vehicle in the right passenger seat. Prior to the hypnosis, the deputy sheriff-witness again related to the people present at the hypnosis session of his identification of Moore, Orlando, and Wren, co-defendants in this case, and identified the vehicle and it's description with a summary of what happened that night.

The witness, then a deputy sheriff, now a Louisiana State Police trooper, has consistently identified the petitioner as the driver of the vehicle which was leaving the scene of the store, and nothing has ever been shown by any evidence that his identification was tampered or influenced or contaminated in any way, nor has there been any alternation or change in his memory or recollection or ability to testify.

A motion to suppress the testimony of the deputy sheriff-witness was held in the co-defendant's case, in June, 1982 before his honor Judge Alfred A. Mansour of the Ninth Judicial District Court. A copy of the Judge's ruling is attached hereto and made a part of this brief and is marked exhibit "A", and the Judge in his ruling did not suppress the testimony of the officer. The Louisiana Supreme Court affirmed the ruling of the trial Judge, and in the petitioner Moore's case, and the co-defendant's case, permitted the use of the deputy sheriff-witness to testify.

After being called back out, the deputy sheriff-witness identified co-defendant Wren as being present in the vehicle, and he has never changed his position that Wren was always in the vehicle. On that date, the witness also identified a picture of Orlando for the first time as the picture of the person who he observed locking up the door to the store, and then getting into the right rear seat of the vehicle. The officer also identified a picture of Moore as the driver. The witness' statement, which was transcribed, was provided to the defense counsel, and was introduced at the motion to suppress hearing in June, 1982, as Orlando-Wren I.

The witness' statement, Orlando-Wren I, is a running narrative by the witness and it indicated the time, place, the vehicle used, the manner in which the vehicle was parked, the parties and their actions as to what they were doing at the store and how they were observed to have left the store, the route that they took, the description of the occupants of the vehicle, with the driv-

er appearing to be an elderly white male with a receding hairline, wearing glasses (this description matches Avery C. "Pete" Moore) the unidentified passenger in the front seat appearing to be a woman with a short but full-type hairdo (which was the reason for the hypnosis) and in the rear of the car behind the driver, Tommy Wren, a white male known to the witness from a prior arrest. Also, the witness identified the license number of the vehicle that he was following, the radio operator that he radioed the information to, the information that he received back on the registration of the vehicle, it being registered to Avery C. Moore of Tioga, the route that he took after he broke off contact with the vehicle, and the fact that when he returned to the convenience store, actions that he took in checking the building, looking into the victim's car, etc. This statement was made on January 18, 1982, approximately two (2) months prior to any hypnosis.

In the statement, the deputy sheriff-witness initially identified the person locking the door and running, getting into the right rear seat of the vehicle as the person he knew to be Michael Ebey of the Tioga area. Later that morning, when he went to the residence of Ebey, and several hours after his first statement, the deputy sheriff-witness told the officers that his identification of Ebey was incorrect, and that the man that he saw locking the door of the store and running to get in the car as it was driving off was not Ebey. The officers did not arrest Ebey or Wren at that time, but merely asked them to come to the station and give statements as to where they had been that night and what they knew about this case. Wren was arrested after the Rapides Parish Grand Jury indicted him.

On January 29, 1981, the witness Vanderhoven was shown a photographic lineup with fifteen (15) photographs, and again, he identified Moore's picture as the driver of the vehicle, and Orlando's picture as the person in the right rear passenger seat, and Wren's photograph as the person in the left rear pas-

senger seat. This statement was also introduced at the June, 1982, motion to suppress, as Orlando-Wren 2, and in that statement, Deputy Vanderhoven also identified four (4) photographs of an automobile that he followed. The vehicle belongs to the petitioner, Moore. In Orlando-Wren 2, the witness identified the photograph of Tommy Wren, who he had both arrested once before, and had other dealings with, and stated that he was one-hundred percent positive that he was in the car the night that he followed the vehicle. Also, at page 3 of Orlando-Wren 2, Deputy Vanderhoven, the witness, stated there was no doubt whatsoever that the other people, Orlando and Moore, were in the vehicle, and he identified their place in the vehicle. In that statement, he also identified that there was someone else in the rear of that car, pushed down, and all that he could see was the top of the head. At that time, he was also asked to elaborate on the female in the right passenger seat, a white female with an upsweeping type hairdo, either light colored, frosted or blonde.

On March 6, 1981, the deputy sheriff-witness was hypnotized by Louisiana State Police Trooper Forest Kavanaugh for the purpose of determining who the female passenger was in the right front seat of the get-away vehicle. Petitioner, and co-defendant Orlando, were arrested two (2) days after the victim was found, prior to the hypnotic interview, Deputy Vanderhoven again related to the interviewer that he was able to identify the people in the car, without any hesitation or error. The purpose of the hypnotic session, as testified to by Deputy Vanderhoven and Deputy Hendricks, the investigating officer, was for the purpose of enhancing the witness' recollection as to the physical characteristics and identity of the female in the right front passenger seat.

Therefore, the deputy sheriff-witness, has identified the petitioner, Moore and co-defendant's, Orlando and Wren, on at least three (3) occasions prior to the hypnosis interview. In this case, no new information has been learned or discovered from hypnosis attempt, and nothing was either enhanced

or recalled through hypnosis.

The Louisiana Supreme Court at 425 So.2nd 759 (1983) followed other states in permitting the use of a witness to testify at trial after that witness had been hypnotized. In Commonwealth v. Taylor, 439 A.2d 805 (1982), the Court distinguished, Commonwealth v. Nazarovitch et al., ___Pa.____, 436 A.2d 170 (1981), the case submitted by the defense in support of their proposition that the witness' testimony should be held inadmissible. In Taylor, the defendants alleged that because the victim was hypnotized, her testimony was unreliable because there existed the potential for fantasy and confabulation. The Court disagreed, and permitted the witness to testify regarding pre-hypnosis recollection, and affirmed the judgment and sentence with respect to both defendants.

In Taylor, the Court stated that it was apparent that the witness had present recollection of the identity of her assailants, prior to the hypnotic session. Page 807. Under the circumstances of the case, the Court found that the testimony was admissible due to the fact that "she identified both appellants prior to the hypnotic session." Also, the victim had numerous opportunities to see both defendants, and she identified the photographs of the defendants from a series of photographs several weeks prior to the hypnotic session. In the case, the victim/witness also misidentified a second person in a line-up, and later identified the correct person. These details were brought to the jury's attention at the trial.

Quoting from the decision, the Court stated that:

> "Therefore, with respect to the victim's ability to identify her two (2) assailants, the hypnotic session did not, in fact refresh her memory and the dangers of unreliable suggestion, fantasy and confavulation are not at issue. . . . Therefore, the victim's testimony was not rendered incompetent by the hypnotic session due to the fact that she did have prior recollection."

In 1981, the Supreme Court of Minnesota in State v. Koehler, 312 N.W.2d 108, re-examined their original position stated in State v. Mack, 292 N.W.2d 764 (Minn.1980), and decided that the victim/witness could testify to matters which were "previously and unequivocally disclosed by him (the victim/witness) to the authorities, prior to the hypnosis." Emphasis and material in parenthesis is added.

In People v. Wallach, 312 N.W.2d 3(1981), the Michigan Court re-examined its holding in People v. Gonzales, 310 N.W.2d 306 (1981), wherein the Court held the witness whose memory had been "restored or created through hypnosis" could not testify about those incidents recalled only "under hypnosis." Distinguishing Gonzales, from the instant case, the deputy sheriff-witness was able to recall the defendants present at the scene of the murder and the fact that the defendant had been with the victim at a bar prior to hypnosis. The Court stated that it was proper for the Court to permit this testimony of matters which were recalled prior to the hypnosis session.

The Court also stated that the defendant's constitutional rights to confront and cross-examine the witness against him were not violated. The defendant's theory was that it would be impossible for a jury to assess the witness' creditability and demeanor after that witness had undergone hypnosis. Citing Diamond, Inherent Problems In the Use of Pre-Trial Hypnosis on a Perspective Witness, 68 Cal.L Rev. 313 (1980), the Court stated that they recognized that there may be some validity in Dr. Diamond's position that the witness's testimony has been "contaminated," however, the Court believed and ruled that a full cross-examination, in which defense counsel can question the previously hypnotized witness concerning the tentativeness of the recollection prior to the hypnosis, will largely alleviate the problem. The Court also permitted the defendant to introduce expert testimony at trial to detail the possibility that hypnotized witnesses might become subjectively more certain of events only

tentatively recalled or, indeed, recalled inaccurately.

In State v. Brown, ____N.W. 2d____, 33 CrL 2391, N.D.,(1983), the Supreme Court of North Dakota held that the pretrial hypnosis of a witness affects the credibility, but not the admissibility of the witness' testimony, rejecting a per se inadmissibility rule as too restrictive. The Court emphasized the factors that indicated reliability, including the training and experience of the hypnotist, the videotaping of the hypnotic session, the fact that the defense that the defense had pretrial notice of the hypnosis, the victim's opportunity to see the attacker, the thorough airing of the issue before the jury, and corroboration of the victim's identification through other evidence. The fact that the victim could not recall significant portions of the attack constituted a valid investigation purpose for hypnotizing and gave initial justification for reliance upon such evidence. In the case before the Court, the only thing that the officer could not recall was as to the unidentified female passenger in the car, not as to the petitioner or any of the other co-defendants.

Two other state Supreme Courts have dealt with the issue of admissibility of testimony by a witness who has been previously hypnotized can be found in Chapman v. State, 638 P.2d 1280 (Wyoming 1982) and Collins v. Superior Court of _____ Arizona _____, (Arizona, 1982), which may be found at 31 CrL. 2155 published in the Criminal Law Reporter, May 26, 1982.

In Chapman, the Wyoming Supreme Court stated that the defendant had had ample opportunity to test the credibility of the previously hypnotized witness to determine whether or not his recollection as to the identity of the defendant had been enhanced by the hypnotic session and, if so, whether such enhancement was only to the extent of a recall of his own memory or whether it included suggested items which were not part of the witness' own memory. The Court stated that the majority of the states are in accord with permitting the testimony of similar witnesses, with the right of the fact-finder to judge the

credibility of the witness on the basis of that information presented to the fact-finder concerning the effect of hypnosis, generally, and the effect of hypnosis in the specific case. Also, the Wyoming Supreme Court stated that there was no need for a strict foundation or requirements such as the New Jersey Supreme Court adopted in State v. Hurd, 432 A.2d 86, 29 Cr.L. 2398 (1981).

In the Arizona Supreme Court case of Collins v. Superior Court, the Court overruled their previous holding in State v. Mena, 128 Arizona 226 (1981). The Court stated that the benefits of hypnosis as an investigatory tool outweighs the dangers, and found that hypnosis is generally accepted as a reliable investigative tool by the scientific community. That Court held that a witness was not rendered incompetent to testify merely because he or she was hypnotized during the investigatory phase of the case, and the witness would be permitted to testify with regard to those matters which he or she was able to recall and relate to prior to hypnosis. The Court stated that some of the risks may be mininized by allowing cross-examination of the previously hypnotized witness in order to permit the opposing party to establish a fact of hypnosis and to introduce expert evidence showing the possibility the witness might be becoming subjectively certain of events only tentatively recalled before hypnosis.

In the instant case on appeal, the officer's identification of the defendant was certain and positive, and his recollection as to the defendants' identity was neither enhanced nor aided in any way by the hypnosis.

Virtually all of the cases prohibiting the use of hypnosis have different factual situations in which hypnosis was used to determine if a crime had occurred, and, if so, who the defendant was. In most of the cases, it was only after hypnosis suggested the answers through the officer's questions, that the victim "remembers" under hypnosis, either the crime has occurred

or the identification of the person that is made. In State v. Hurd, supra, the victim was unable or unwilling to describe her assailant to the officers at the hospital emergency room. It was only after she was placed under hypnosis that she responded to the questions from the officers, and only then did she state that it was the defendant who attacked her.

In State v. Mack, 292 N.W.Rep.2d 764 (Minn. 1980), the victim was described as "quite drunk" and originally insisted that the injuries that she had received were not the defendant's fault. She originally indicated to the officers that she had been injured in a motorcycle accident, and it was not until two (2) days later that she told police that she had been assaulted. Also, she indicated to the police that she had been suffering emotional problems, due to a serious relationship with a man that had recently ended, and that she had "blacked out" from drinking on other occasions. Subsequently, six (6) weeks later, the officers induced hypnosis with a standard procedure, and only then did she state that the defendant had pulled out a switchblade knife and tried to kill her for running out on the defendant.

The Supreme Court in that case stated that hypnotically induced evidence can create a problem of perceptions which neither were nor could have been made, and the Courts also stated that the circumstances presented by the case before them are "most suspect." Obviously, the Court was worried about a witness-victim, who herself was very suspect, and was unable to make a determination that a crime had occurred, or identify that a person had committed the crime.

In the recent California case of People v. Shirley, _____P.2d_____ (Cal. 1982), a "victim" was hypnotized in order to determine what had happened in this rape and sexual crime case. The case was a "one-on-one" crime, with no other witnesses. The Supreme Court stated that the victim-witness' testimony is "replete with doubt, with her testimony being vague, changeable, self-contradictory, or prone to unexplained lapses of memory." The victim was a

bartender at a saloon, and on the date of the offense, was off-duty and "feeling kind of bad." She was under the influence of alcohol and staggered when she walked. The defendant offered to take her to get something to eat and then home. The defendant readily admits taking her home and stated that they entered into a consentual act of sexual intercourse, whereas the victim testified that it was only through force and threats that she submitted, and was compelled to have sex with the defendant. According to the witness, before being hypnotized she could only "vaguely" recall what had happened during the evening and stated that the hypnosis helped her to "fill in the gaps" in her memory. Suppression of this witness's testimony was proper on the facts of the case.

At page 5 of the defense brief, counsel cites People v. Tait, wherein the Michigan appeals court reversed the defendant's assault case because of the admission of testimony of the victim of the alleged assault who was hypnotized prior to trial. The Court did reverse the conviction, but the reversal was due to the fact that the prosecution had not informed defense counsel of the deputy sheriff witness' memory having been refreshed by hypnosis, and the jury was never informed that the witness' memory had been refreshed through hypnosis. Also, the trial court ordered both counsels not to refer to hypnosis in the jury's presence and refused to give defendant's requested instructions on the fact of hypnosis. It is true that the Court did state that the use of hypnosis on persons carries a "dangerous potential for abuse" but, the Court stated that the abuse can be reduced to a minimum by (1) keeping complete records of the interviews of the persons who are hypnotized, (2) the judge, jury and opponent should know who was present, and (3) they should be informed of the questions that were asked and the witness' response. Therefore, Tait was reversed on procedural grounds, and not on the issue of hypnosis in general

In the instant case, Deputy Vanderhoven's previous identifications and

statements do not contain the suggestibility or inherent dangers which were present in the other cases which prohibited the use of hypnotically refreshed testimony. In this case, the officer made a narrative statement on January 18, 1981, a few hours after observing the defendants' vehicle at the convenience store; also, the witness gave a question and answer interview on January 29, 1981, when he was shown several photographs to identify, and then on March 6, 1981, prior to being hypnotized, the witness again related the essential details of the crime, and the participants, to the interviewer.

Deputy Vanderhoven was called by the co-defendants, Wren and Orlando at the motion to suppress June, 1982 hearing, and beginning at page 5 of the transcript and continuing, the witness related to the Court his investigation on the night of the abduction and murder, January 17, 1981. In his testimony, he related that he first observed seeing an automobile parked parallel to the store at approximately 10:15 p.m. It is imperative that this Court review that transcript to see the background and reasons why the trial and Supreme Court reached their opinion. At page 6 of the transcript, and later at page 9 of the transcript, the witness identified both defendants as being at the store, or in the vehicle, while he watched the scene, and then followed the vehicle. Not knowing that an armed robbery and abduction were happening, the deputy followed the vehicle for a short while, ran a registration check of the vehicle, and determined from other officers that everything at the scene of the convenience store appeared normal, before breaking off the surveillance. During this surveillance, the witness followed the vehicle at a close distance and observed the people inside for several minutes, concentrating on the identity of the occupants. It was subsequent to this investigation that the body of the store manager was found a short distance down the road from where the officer last had the vehicle under surveillance. The officer-witness returned to the scene of the investigation and gave a statement to the police which was pro-

vided to defense counsel, and which was introduced at the motion to suppress that he showed two (2) photographs of the defendants Orlando and Moore to the witness Vanderhoven at approximatley 6:00 a.m. on January 18, 1981, several hours after the witness had given a narrative statement. Page 60, transcript of motion to suppress. Deputy Richard stated that "it was a very brief contact with him", and stated that there were a lot of people engaged in the investigation of this heinous crime at that time of the morning, and that the conversation with the detective was for a very brief period of time. Also, Deputy Richard stated that he did not make any record of the conversation in the police reports.

At the motion to suppress in June, 1982, Deputy Vanderhoven stated that he had no recollection of a photographic display with the pictures of the defendants that were shown to him on January 18, 1981 or March 6, 1981. Dr. Diamond testified that this lack of recall is caused by "source amnesia", a condition caused by hypnosis. It is noteworthy that Dr. Diamond explains the effects of the amnesia on the hypnosis, but he is unable to explain why neither Trooper Kavanaugh nor Detective Hendricks recalled seeing or showing the fifteen photographs to the witness at the conclusion of the hypnotic interview. Obviously, Dr. Diamond attempts to bolster his position that hypnosis caused the "source amnesia", but he is unable to explain in his testimony why Kavanaugh and Hendricks both also forgot the fifteen (15) photographs being shown to the witness.

The failings of human memory are nothing new to any of the members of the Court, and everyone is familiar with the effect of the passage of time on the ability of a person to recall what happened at one specific moment. The officers, including Deputy Vanderhoven, merely forgot the pictures had been displayed.

Dr. Diamond also stated under oath that nothing new was elicited from

the witness Vanderhoven through the use of hypnosis. Vanderhoven was able to recall before the hypnosis interview everything in the case. Dr. Diamond stated that in the majority of cases, nothing new comes up through the hypnosis interview.

At page 183 of the transcript of motion of suppress, Dr. Diamond stated that:

> "the major effect of hypnosis is of coaching the witness, so that one changes the witness who might have been uncertain or applied self-criticism, who is hesitant, and the like, into a very self-confident, and I might say a very impressive witness."

Later, Dr. Diamond stated that:

> "a witness can be coached in other ways to repeating interragation and the like, and lineups and photographic lineups and the risk, can amount to. . .uh. . coaching witness. . .that can in some instances be as serious as hypnosis."

Dr. Diamond also stated that all of the works that he used as authorities in presenting his views of the effects of hypnosis on a witness, were based on eye-witness testimony testing, and not from any results from testing done on witnesses who had been hypnotized. Dr. Diamond, also at page 186 of the transcript, stated that he was very troubled with the reliability of eye-witness testimony and identification and stated that there are serious problems with the reliability of eye-witness identifications.

The burden of proof in this case was on the defendants, and the State submits that the defendants have not met the burden of proof through either the decisions in other jurisdictions, the medical evidence, or the factual showing required in a motion to suppress. Their own doctor stated that nothing new was obtained in this case, and that the most serious problem in this case would be the coaching of a witness, which could be caused in

other ways such as through repeated interrogations, line-ups, and reveiwing the case with the witness.

Judge Alfred Mansour in his written reasons, a copy attached hereto and made a part of this brief, for denying the motion to suppress, heard and saw all of the witnesses, and at page 3 of his written reasons stated that:

> "However, it should be stated for record that the Court observed this witness to be straightforward and direct. He tesified on direct and cross-examination as one would expect an officer of the law with nine years of experience to testify. . .
>
> The defense, showing its potential contamination, seeks to suppress Deputy Vanderhoveh's testimony under the Fifth Amendment right to confront a cross-examined witnesses.
>
> Nevertheless, I believe this to be a fact issue that should be presented to the trier of fact as to the weight and sufficiency of the evidence. It should not be disposed of by some blank and exclusionary rule under admissibility of evidence."

The factual background of this case differs very definitely from the cases cited by the defense attorney in his brief from sister jurisdictions who have prohibited hypnotized witnesses from thereafter testifying. The State submits that this case shows a complete and independent basis for the admission of Deputy Vanderhoven's testimony, due to his previously having on several different occasions identified the defendants Orlando, Wren and Moore. Likewise, his statements to the police, and his testimony, have all been provided to the defense counsel and are subject to use by them for the purpose of their cross-examinations and informing the trier of the fact of the hypnosis issue, and any effect which may have occurred on the witness. Finally, in the following cases, the Courts in different jurisdictions have permitted the use of the of the testimony of a person who has been hypnotized. Clark v. State,

379 So.2d 372 (1979), U. S. v. Awkard, 597 F.2d 667, People v. Smrekar, 385 N.E.2d 848 (Ill.1979), State v. McQueen, 244 S.E.2d 414 (S.Ct. of N.C. 1978) and Creamer v. State, 205 S.E.2d 240 (Ga. S.Ct. 1970) and finally, State v. JOrgesen, 492 P.2d 312 (App. 1971).

In Clark, the Court stated that the United States Court of Appeals, Ninth Circuit, in Kline v. Ford Motor Company, Inc., 523 F.2d 1067, permitted the witness to testify as to events that were personally heard and seen at the time, and that the witness was testifying about present recollection of events that she had witnessed. The Court stated that the circumstance that witness was hypnotized prior to trial would only affect "the credibility of the testimony concerning the occurances, but would not render the testimony incompetent."

In Awkard, the Ninth Circuit U. S. Court of Appeals, in 1979, stated that "the use of hypnotically induced evidence has gained acceptance in many jurisdictions". Pre-trial hypnosis of witnesses is permitted in that circuit in both criminal and civil cases. The fact of hypnosis, if disclosed to the jury, may effect the credibility of evidence, but not its admissibility.

In Smrekar, the Court in 1979 in Illinois, stated that:

> "when a witness is capable of giving testimony having some probative value, the witness is permitted to testify with evidence of impairment of the ability of the witness to accurately recall evidence or that suggestive material has been used to refresh the witness' recollection, goes only to the weight to be given to the testimony of the witness." Page 853

The Court permitted the testimony of the witness identifying the defendant as the person she saw at the scene of the crime, and stated that the evidence showed that at the time of the occurrence, the witness had ample opportunity to view him.

The Court stated that:

> "We consider this testimony to have been an aid to the trier of fact in arriving at the truth and to have been properly admitted." Page 855

In McQueen, the Supreme Court of North Carolina stated that the circumstance that the witness was hypnotized prior to trial will affect only the credibility of her testimony concerning the occurrences at the home where at the time when two (2) people were killed, and "would not render the testimony incompetent." Page 427.

In Creamer, the Supreme Court of Georgia, stated that the evidence disclosed that the victim related to the authorities the principle facts and details of the crime prior to being hypnotized, and that since both counsel are experienced advocates who can vigorously and competently cross-examine extensively and thoroughly the victim, the fact that the victim was placed under hypnosis, and the purpose therefore, can clearly be made to the jury. The Court stated that the victim could testify before the jury.

The Louisiana Supreme Court in its decision of the entire motion to suppress hearing in the co-defendants' motion to suppress hearing agreed with the State's assessment that other states which have prohibited the testimony of a witness who has been previously hypnotized where distinguishable from the present case. The Louisiana Supreme Court held that the "issue of Vanderhoven's hypnosis should go to the question of the proper weight to be accorded his testimony rather than the question of its admissible." The Court agreed that a skillful cross-examination would enable the trier of fact the effect of hypnosis on Vanderhoven's credibility. Additionally, since Vanderhoven's first two (2) statements provided an independent basis for corrobaration of his hypnotic and post-hypnotic statements and identification, any of the feared risk of "confabulation" and undo suggestion become insignificant. The Supreme

Court affirmed the use of Deputy Vanderhoven as a witness in the Wren and Orlando trial. In petitioner's appeal, at the oral argument, the defense counsel was specifically asked by a member of the Court from the bench as to whether there were any facts present in the petitioner's case which might distinguish it from the co-defendants case of Wren and Orlando which had been decided in January 10th, 1983. At footnote 6 in that opinion from the Louisiana Supreme Court, the Court noted that the counsel was asked whether during trial if the witness deputy sheriff had testified as to any facts that had been hypnotically - induced, i.e., had the hypnosis caused him to testify to any facts which were unknown before he had been hypnotized. Counsel, replied with an unequivocal, "no.".

The State submits that the trial court's decision, and the decision by the Louisiana Supreme Court in this case and the co-defendants' case, are proper, and that the defendants have not been denied any Fifth Amendment Confrontation Rights.

2. DISPROPORTIONALITY OF CRUEL AND UNUSUAL PUNISHMENT

and

3. CIRCUMSTANTIAL EVIDENCE AS TO EQUAL PROTECTION UNDER THE LAW

At page 285 of the trial record, presiding Judge Jules Davidson, in his per curiam to the assignments of error filed by defendant, stated that, "There is ample evidence to link Mr. Moore with this crime and to support the jury's recommendation of death."

Also, in the uniform capital sentence report filed on April 23, 1982 by Judge Davidson, page 5(b), the Court stated that:

> "Mr. Austin was killed by Mr. Moore and others, who had been planning Mr. Austin's demise for at least two (2) weeks. This murder was carried out in the cold, calculated fashion solely for the purpose of robbing the defendant (sic). By this murder and the murder of his wife in 1967, Mr. Moore has demonstrated his complete lack of respect for any human life other than his own. This Court finds it significant that Mr. Moore committed this murder within two (2) years of his release from Angola, where he was being held because of the killing of his wife. This is the only appropriate sentence in this case." (Emphasis Added)

The State incorporates by reference the uniform capital sentence report filed in connection with the death penalty imposed in this case, and also by reference, adopts the position of the State in the State's Sentence Review Memorandum, pursuant to Rule 905.1, filed on September 7, 1982 in the Louisiana Supreme Court. In that memorandum, the State explored the facts of the case and the background of the defendant. The memorandum showed that the evidence supported the jury's finding of guilt, and the jury's finding of a statutory aggravating circumstance. Finally, the State submits that the sentence of death is the only appropriate sentence to impose in this case, considering the

background of the defendant, and the nature of the crime.

The defendant in his brief cited the United States Supreme Court case of Enmund v. Florida, U. S. Docket No. 81-5321 (1982)_____U.S._____. This case is not applicable to the case before the Court. In the Enmund decision, the Supreme Court held that the record did not show that the defendant had the necessary intent to kill the victim, nor did he kill the victim. Therefore, the Court ruled it was impermissible for the State to treat a robber the same as a person who was the actual murderer of the victim. The death penalty is not a valid penalty under the Eighth and Fourteenth Amendments to the United States Constitution "for one who neither took life, attempted to take life, nor intended to take life." A defendant's intentions, and therefore his moral guilt is critical to the degree of his criminal culpability.

In this instant case, the State showed through overwhelming evidence that this defendant actively planned, conspired, and intended for the death of the victim to occur. This was shown through the testimony of Margaret Weems, the great niece of the accused, who testified that approximately two (2) weeks prior to the murder, the defendant had stated that "he ought to rob the man (the victim), shoot him in the back and dump him in the ditch."

The Louisiana Supreme Court in its decision in affirming the conviction and sentence of the defendant-petitioner stated that "here, the evidence against the defendant, albeit circumstantial, is overwhelming.[8]" The Louisiana Supreme Court reviewed the evidence beginning with Margaret Weems, the petitioner-defendant's niece, who testified that as much as a week to ten (10) days prior to the murder, the petitioner was talking about robbing the victim, shooting him in the back, and throwing him in a roadside ditch. The witness and her son testified that the defendant owned a .380 caliber pistol, that the defendant-petitioner and co-defendant, Vincent Orlando visted the household and gave to the witnesses two (2) pistols to hold for them while they

were at the house and that they took the pistols with them when they left the next day from her home, approximately ten (10) days before the actual abduction, robbery and murder. Also, the witness, the niece of the petitioner testified that when she informed the petitioner that he was being sought in connection with the murder, the petitioner stated "the old S.O.B. is dead and there isn't any witnesses." Mrs. Weems also testified that the defendant-petitioner told her that "there weren't any women involved" when she told him that her child had advised her that the police might want to question her about the incident.

The Court also considered the statement of Ralph Guy, Linda Reed's ex-boyfriend, who testified that the defendant was supposed to have been baby-sitting Linda's three (3) children at her residence from about 4:00 p.m. on the evening of the murder, but that the defendant was not there when he went to the residence between midnight and 1:00 a.m. Guy received several calls from the children earlier in the evening. Mrs. Weems testified that she had been calling the residence from about 6:00 p.m. to 9:00 p.m. on the night of the murder looking for the defendant, last trying at 9:09 p.m., but "it was a kid kept answering the phone." She finally reached the defendant at about 4:00 a.m., and she testified that he said he "had just come in . . . (from) out trying to score some money." Mrs. Weems testified that it usually took about four hours to drive from Tioga to Houston.

Also, Earnest O'Dell, a disc jockey at a Houston nightclub, testified that he was approached at the club by the petitioner and Vincent Orlando, the night after the murder, and the petitioner told him to tell the police that he (Moore) had been in the club on the night of the incident because they were trying to "pin a rap on him" for a murder in Louisiana. O'Dell's testimony was corrobarated by the club's owner, Robert Fields, who testified that he had seen the defendant and Orlando approach O'Dell at the club on the night following the killing. Laura Simms, a dancer at the club, testified that she

was also approached by the two and that the defendant told her not to say anything about his presence in Louisiana on the night of the murder.

Mrs. Austin, the victim's wife, testified that her husband had told her about a week before the murder that Michael Ebey had told him that there might be a robbery attempt at the store. Ebey testified that he learned of the defendant's plan to rob and murder the victim a few days prior to the incident from Mrs. Weems daughter, Karen. Mrs. Austin accounted for her husband's possessions as he had carried with him $230. in cash (which was to be deposited in their savings account on Monday), a .38 caliber pistol, a pocketknife, and the combination to the store safe. These items were missing from Austin's body.

James Milligan, the last customer to see the victim alive, testified that he left the store just minutes after closing time and observed the defendant's vechicle to the left side of the store, out of view from anyone inside, at approximately 10:00 p.m. the night of the victim's abduction, robbery and murder. At trial, he identified photographs of the defendant's car as the vehicle he had seen beside the store.

Deputy Vanderhoven gave extensive testimony concerning his observations on the night of the incident and made a positive in-court identification of the defendant as the driver of the vehicle.

Larry Craven, who lived approximately 100 yards from where the victim's body was found testified that he heard a single gunshot at about 10:30 p.m. on the night of the murder.

Raymond Cooper, a criminalistics expert, testified that plaster casts of tire imprints found near the body matched by class characteristics the tires on the defendant's vehicle.

The Court concluded, after viewing this great body of evidence in the light most favorable to the prosecution, that any rational trier of fact could have found the essential elements of the crime proved beyond a reason-

able doubt. The evidence is uncontroverted that the victim was robbed of his valuables at gunpoint and shot to death. Specific intent may be inferred from the circumstances of the transaction. LSA-R.S. 15:455; State v. Motton, 395 So.2d 1337 (La. 1981). Given the extensive testimony concerning the petitioner's prior threats to rob and kill the victim, any rational trier of fact could have concluded that the defendant shot the victim with specific intent to kill while engaged in the prepetration of an armed robbery.

In the instant case, the State showed through overwhelming evidence that this defendant actively planned, conspired, and intended for the death of the death victim to occur. In footnote 9 of petitioner's appeal in the opinion the Louisiana Supreme Court noted that the defendant even if he did not fire the fatal shot, the petitioner was clearly a principle who shared with the actual killer the specific intent to kill the victim. Even if another of the occupants actually pulled the trigger, the evidence adduced at trial was such that any rational trier of fact could have concluded that the defendant had the specific intent to rob and kill the victim. He was therefore properly convicted of first degree murder".

CONCLUSION

The State prays that this honorable Court deny issuing a Writ of Certiorari, and affirm the action taken by the honorable Louisiana Supreme Court.

Respectfully Submitted;

STATE OF LOUISIANA

BY: Edwin O. Ware III

EDWIN O. WARE, III
District Attorney
P. O. Drawer 1472
Alexandria, Louisiana 71301
(318) 473-6650

CERTIFICATE OF SERVICE AND MAILING

I, Edwin O. Ware, III, a member in good standing of the Bar of the Unites States Supreme Court, do hereby certify that:

1.

The above and foregoing Opposition Brief by the State of Louisiana to the Petition for Writ of Certiorari to the Louisiana Supreme Court has this 24th day of October, 1983, been served to the following:

1. Mr. Steven Everett
   Attorney for Petitioner
   P. O. Box 1842
   Alexandria, Louisiana 71301

2. Mr. Alexander L. Stevas
   Clerk
   Supreme Court of the United States
   Washington, D.C. 20543

by depositing the above with the United States Mail, postage prepaid on this 24th day of October, 1983.

Alexandria, Louisiana, this 24th day of October, 1983.

Edwin O. Ware III

EDWIN O. WARE, III

CRIMINAL DOCKET NUMBERS 200,647-B & 200,648-B

STATE OF LOUISIANA — NINTH JUDICIAL DISTRICT COURT

VS. — PARISH OF RAPIDES

VINCENT ORLANDO — STATE OF LOUISIANA

CONSOLIDATED WITH

CRIMINAL DOCKET NUMBERS 200,647 & 200,648

STATE OF LOUISIANA — NINTH JUDICIAL DISTRICT COURT

VS. — PARISH OF RAPIDES

TOMMY WREN — STATE OF LOUISIANA

REASONS FOR DENIAL OF MOTION TO SUPPRESS

At issue before the Court in this motion to suppress is the effect of the use of hypnosis on a witness by criminal investigators in their attempt to ascertain information prior to that witness's testimony at trial. This is a res nova issue in the State of Louisiana.

Deputy Bruce Vanderhoven witnessed the abduction of the victim of an armed robbery and murder from his sheriff's cruiser, but was not aware that a crime was in progress.

Immediately upon learning of the crime Deputy Vanderhoven gave sheriff's investigators a detailed description of two of the subjects involved. He mistakenly identified one of these two subjects as Michael Ebey, but upon later seeing Ebey with facial hair and walking with the aid of crutches he retracted that statement.

He identified another suspect as Tommy Wren, Michael Ebey's roommate. Mr. Wren was known to Deputy Vanderhoven because of a prior arrest.

A fourth subject observed by Deputy Vanderhoven, other than the victim, remains an unidentified female.

Deputy Vanderhoven later changed his identification of the man he believed to be Michael Ebey to Vincent Orlando after being shown photos in a police photo lineup. He also identified photos of Avery C. "Pete" Moore as the man driving the car used in the crime.

Thus, Deputy Vanderhoven made positive identification of Avery C. "Pete" Moore, Vincent Orlando and Tommy Wren prior to the hypnotic session.

The criminal investigators attempted to identify the unknown female accomplice by hypnotizing Vanderhoven. The purpose of the hypnosis was solely to identify the female subject in the car.

The hypnotic session did not raise any new evidence from Deputy Vanderhoven's memory. The female subject remained unidentified.

Defense expert Dr. Bernard Diamond explained in great depth the effect that post hypnotic suggestion can have on a witness's ability to use his critical judgment during his testimony at trial. He said that this effect would make it virtually impossible for a witness to be meaningfully cross-examined.

Dr. Diamond suggests that once hypnosis has occurred the dichotomy between independent memory and hypnotic suggestion no longer exists.

In analyzing Deputy Vanderhoven's testimony at the hearing, Dr. Diamond stated that at one point he felt that Deputy Vanderhoven may have momentarily slipped back into the hypnotic trance. Admittedly the Court is not trained to detect such an occurrence by way of voice fluctuation, etc., so the Court can make no determination on this point.

However, it should be stated for the record that the Court observed this witness to be straightforward and direct. He testified under direct and cross-examination the way one would expect an officer of the law with nine years of experience to testify.

The defense, by showing this potential contamination, seeks to suppress Deputy Vanderhoven's testimony under the Fifth Amendment right to confront and cross-examine witnesses.

Nevertheless, I believe this to be a fact issue that should be presented to the trier of fact as to the weight and sufficiency of the evidence. It should not be disposed of by some blanket exclusionary rule on admissibility of evidence.

For the foregoing reasons the motion to suppress is denied.

Alexandria, Louisiana, this 7th day of July, 1982.

Alfred A. Mansour

ALFRED A. MANSOUR
District Judge
Division "A"

82 JUL 7 P3:34

CLERK & RECORDER
RAPIDES PARISH, LA.

Exhibit "A"
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